

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
The State of Missouri
AT THE
OCTOBER TERM, 1879.

(Continued from Volume 70.)

PETING, *et al.*, Appellants, v. DE LORE.

Common Field Lot: ADVERSE POSSESSION. The title of a claimant of a common field lot, confirmed by the first section of the act of Congress of June 13th, 1812, was completely vested in him by said act, at its date; and title by adverse possession under the statute of limitations might begin to ripen against him from and after such date, without regard to the date of survey of his lot, the approval thereof, or of its return to the office of the recorder of land titles.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

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G. M. Stewart and I. D. Foulon for appellants.

Sam. Reber for respondents.

NORTON, J.—This is an action of ejectment instituted to recover part of a common field lot of one and a half by forty arpents, in the Common Field of Carondelet. Defendants, in their answer, deny plaintiffs' title, and set up title in themselves. The cause was submitted on the following agreed statement of facts: It is agreed, for the purposes of this case, that the land in controversy is part of a confirmation for one and a half by forty arpents, in the name of Peter La Puente's legal representatives, designated in Recorder Bates' report, referred to below, as "ancient lot in Field of Carondelet." It was a concession for one and a half by forty arpents in Prairie Catalan, granted by the Spanish Lieutenant-Governor Pedro Pier-nas, to Peter La Puente, 25th June, 1775, in which the land is described as being bounded on one side by L. Le May, and on the other by vacant land. It was afterward, to-wit: by the act of Congress of June 13th, 1812, presented to Recorder Bates on the 30th day of December, 1813, and evidence was taken by him and the same was included in his report, and submitted to Congress for approval 2nd day of February, 1816, as being a claim that should, in his opinion, be confirmed and surveyed according to possession. It was confirmed by the first section of the act of Congress of the 13th day of June, 1812, and afterward by act of Congress of April 29th, 1816, to Peter La Puente's legal representatives, to be surveyed according to possession. In pursuance to this confirmation a survey of the said grant was made in 1839, and was approved on the 1st day of August, 1846, and was returned to the United States Recorder on the 30th day of June, 1862, and then recorded in book F, page 182, United States Recorder's Office. Amadee Peting, one of the plaintiffs, claims under a deed duly executed to him on the — day of —, 1874,

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by Francois Marchalles and wife, conveying all the right, title and interest of the said Marchalles and wife, as heir of Peter La Puente, to the land in question. The said Mrs. Marchalles is an heir of La Puente, was married to said Marchalles in 1845, and since that date has been continuously a *femme covert*. The other plaintiffs are the surviving descendants and legal representatives of Peter La Puente, and one of them, Josephine De Hatre, wife of Francis De Hatre, has been continuously a *femme covert* since 1861. No conveyance of the land in question, or of any interest therein, has ever been made by La Puente, or his legal representatives, save the conveyance by Marchalles and wife to Peting, above stated. No patent for the above land was ever issued by the United States Government. The land granted to Peter La Puente, and surveyed in survey 95, was a common field lot in the common fields of Carondelet, and, as such, is bounded south by common field lot granted and confirmed and surveyed to Le May's representatives by United States survey No. 95, and north by common field lot granted, confirmed and surveyed to Roy's representatives by United States survey No. 94. The defendants, and those under whom they claim, have been in the actual, exclusive and adverse possession and occupancy of the land sued for, claiming the same as their absolute property against the plaintiffs and all others, from the year 1814, continuously, until the present time, and they have made valuable improvements thereon. The circuit court gave judgment for the defendants, which, on appeal, was affirmed in the court of appeals, and the plaintiffs appealed to this court.

The only question which is presented by the facts agreed upon, is whether plaintiffs are barred by the statute of limitations from recovering the land sued for. This suit was instituted in 1875, one hundred years after the concession by the Spanish Government was made, and sixty-one years after the occupancy and adverse possession of defendants, and those under whom they claim, began.

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It is insisted, however, by counsel that, notwithstanding said concession was confirmed by the 1st section of the act of Congress of the 13th day of June, 1812, and afterward by an act of Congress of April 29th, 1816, to Peter La Puente's legal representatives to be surveyed according to possession, and notwithstanding a survey of said grant was made in 1839 and approved in 1846, the statute of limitations did not begin to run against plaintiffs until such survey was returned to the recorder for record in 1862, at which last period it is claimed the title for the first time became vested in La Puente's legal representatives. The position thus assumed is overthrown by the case of *Guilard v. Stoddard*, 16 How. 494, in which it was held, that "the act of 1812 is a present operative grant of all the interest of the United States in the property described in the act, and that the right of the grantee was not dependent upon the *factum* of a survey under the Spanish Government;" that the act "makes no requisition for a concession, survey or permission to settle, cultivate or possess, or for any location by public authority, as the basis of the right, title or claim, upon which its confirmatory provisions operate." The doctrine of this case was re-affirmed in the case of *Glasgow v. Hortiz*, 1 Black 595. In the case of *Milburn v. Hardy*, 28 Mo. 514, it was held "that by the act of the 13th day of June, 1812, the United States was divested of all title to the property described in the 1st section of that act as confirmed to private claimants. The act was a grant *proprio vigore*, and the title of each claimant under it was complete at its date, and he could maintain his ejectment upon mere proof of inhabitation, cultivation or possession without any further or other evidence of title." It is, therefore, manifest that the legal representatives of La Puente could, at any time after the passage of said act, have maintained ejectment against the occupants of the land in controversy, and, as such occupancy has been adverse and continuous since 1814, a period of sixty-one years

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before the institution of this suit, judgment was properly rendered for defendant. Judgment affirmed. All concur.

REEL, *Appellant*, v. EWING.

Equity: ACTION TO COMPEL REDEMPTION: LACHES. The petition in this case alleged in substance that at a sale under a deed of trust given by defendants to secure the payment of a debt to plaintiff, the plaintiff, at the instance of defendants, purchased the property at the full amount of the debt, that plaintiff was induced to do this by representations made to him by defendants that the property was worth largely more than the debt, and a promise by them to redeem within thirty days, that the representations were false and fraudulent, that the property was worth much less than the debt, and that the promise had not been fulfilled. There was a prayer that defendants be compelled to redeem by paying the full amount of the debt. The evidence failed to show any promise to redeem, but showed at most that defendants had said they would endeavor to raise the money and take the property back within thirty days. It also showed that plaintiff had known the property long before the sale, that at the time of the sale it was worth more than the debt, that plaintiff took possession immediately after the expiration of the thirty days, and continued to treat the property as his own for two years before bringing this suit, that in the meantime the commercial panic of 1873 had occurred, in consequence of which this, like all other property, had greatly depreciated in value. *Held*, 1st, that plaintiff had never had a cause of action; 2nd, that if he had ever had one, he had delayed too long the enforcement of his rights.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

E. T. Farish for appellant.

Noble & Orrick for respondents.

NAPTON, J.—The petition in this case was filed on the 16th day of August, 1875. It charges that the defendants made their deed of trust to Robert A. Bakewell, of date May 30th, 1871, conveying a certain piece of land in

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"Prairie Place" on St. Charles road, near the city of St. Louis, in trust to secure the payment of seven promissory notes: One, a principal note for \$8,000 at three years; and the others, interest notes for \$400 each, payable respectively in six, twelve, eighteen, twenty-four, thirty and thirty-six months after date; that the notes maturing at eighteen and twenty-four months becoming due and remaining unpaid, the said trustee, at the request of plaintiff, did advertise said property for sale on the 12th day of July, 1873; that very shortly before said day of sale the defendants, Ewing and Eoff, represented to said trustee, as agent of plaintiff, and to plaintiff, that said property was worth much more than the amount of said debt, and that they were extremely desirous to avoid a sacrifice of the same, and did earnestly entreat said plaintiff and said Bakewell, not to sacrifice the same by a forced sale, but to indulge said defendants for a reasonable time, and did then promise said John H. Reel, that if he, said Reel, would, at the said sale, purchase the said property for the amount due on said notes, and interest and costs, they, the said defendants, would, in thirty days from date of said sale, pay to said plaintiff the full amount of said notes then due, and interest and costs on his executing to them a quit-claim deed for said property, or causing a deed to be executed by said trustee to them of the same; that said John H. Reel, the plaintiff, fully believing the representations of said defendants in this behalf, and taking their statements to be true as to the value of said property, which they represented to be largely in excess of said debt, and being desirous not to damage them or sacrifice their property, but merely to secure the payment of his said debt, did, on the faith of the aforesaid representation of said Ewing and Eoff, direct said trustee to strike off said property at said sale to him, the said plaintiff, at the amount of said debt and costs, and to execute no deed for the same until the expiration of said thirty days; that, thereupon, the said trustee, at the request of said Reel and said defendants, and on the faith of the said

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promise and agreement of said defendants to said plaintiff, and, for the purpose of carrying out the same, did, on the day of said sale, strike off said property to said plaintiff at the price and sum of \$9,100, being the amount then due on account of said debt and interest (\$8,921) and \$179 the estimated expenses of said trust; that at the expiration of thirty days the said defendants positively refused to carry out their said agreement and promise, and declined to pay the said sum and to receive said property, whereupon the said trustee who had already executed and acknowledged a deed for the same, with the name of the grantee in blank, did, on the 12th day of August, 1873, deliver said deed to said John H. Reel, who caused the blank therein to be filled up with his own name, and recorded the same.

Plaintiff says that, relying upon the false representations of defendants, he did always, until the defendants refused to carry out their agreement as aforesaid, believe said property to be worth much more than the amount of said debt; that he was completely deceived and thrown off his guard by the false and fraudulent representations of defendants in this respect, and by their false and fraudulent pretense that they were afraid to have the property sacrificed at a forced sale, and by their entreaties to him to save the property to them by purchasing it as aforesaid and holding the same as aforesaid for thirty days for them; and that but for said false and fraudulent representations and pretenses which were made, as plaintiff avers, by defendants, for the purpose of defrauding plaintiff and leading him to bid at said sale the amount of said debt, he would not have purchased said property at said sale; that there was no competition and no bidding whatever at said sale, said defendants purposely absented themselves therefrom for the purpose of carrying out their fraudulent purpose to shove off said property on plaintiff for their debt to him, and in accordance with their agreement with plaintiff that he should purchase the same.

Plaintiff says that on the day of said sale the said

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property was not worth more than \$5,000, and is not now worth that sum; that he made said loan on the faith of defendants' representations that the same was worth largely over \$10,000, which defendants well knew to be false, and that relying upon the said representations of defendants, and fully believing the same, he did at said sale purchase said property to hold in trust for them, and not otherwise, fully believing that upon the expiration of said thirty days defendants would pay to plaintiff said debt, interest and costs.

Plaintiff says that said notes of defendants, to-wit: said note for \$8,000 and the ones last maturing of said interest notes, are still in the hands of plaintiff unsatisfied; that in pursuance of said understanding with, and direction of, defendants, and only because thereof, plaintiff bid in said property, and now and ever since has held the same in trust for said defendants, and is ready and willing, and has always been ready and desirous to convey the same to defendants upon their compliance with their agreement as aforesaid, and has offered so to do; but defendants have refused and still refuse to accept said property and pay the bid so made for defendants by plaintiff. And plaintiff now offers to convey to defendants the property acquired by said sale, by good and sufficient deed, upon their compliance with their promise and undertaking as aforesaid. Wherefore plaintiff prays that defendants be adjudged and decreed to pay plaintiff said sum of \$9,100, with interest from the 12th day of July, 1873, with costs, and for such other and further relief in the premises as may be equitable and just.

The answer of defendants is a specific denial of each allegation in the petition.

There was a judgment for plaintiff in the circuit court, which judgment was reversed in the court of appeals, and the case is brought here by the original plaintiff, Reel.

To a correct understanding of the merits of this case, a statement at least of the substance of the evidence is

necessary, and for this purpose, Judge Bakewell being the principal witness for plaintiff, and in fact the plaintiff's agent or attorney in the transaction complained of, we copy the printed condensation of his testimony, made by the plaintiff's attorney, Mr. Farish, the partner of Judge Bakewell until his transfer to the bench.

Judge Bakewell testifies that whilst the advertisement was in the paper, and before the day of sale, defendant Eoff came into his office and stated that this was a very hard case upon himself and Mr. Ewing, that they did not want the property sacrificed, that the property was valuable, and that they did not want to have it sold in that way without having time to look around and secure themselves by protecting the property. He asked him to act as his friend in this matter, and see that nothing of that kind was done. Bakewell then told Eoff that as far as that went it was unnecessary for him to be present at the sale at all; that if they desired it to be so done the property should be bid off for the amount of the debt, costs and interest. Eoff then said that if Bakewell would do that, Ewing and Eoff would endeavor to raise the money and let him, Bakewell, have it, and take the property within a month, that is, pay the amount within a month if that was done. The impression given Judge Bakewell by Eoff was, that here was valuable property which largely exceeded the loan, that they wanted to have time to arrange the matter, and that it was understood, as a matter of favor to defendants, that they were to have a month, within which time they were to raise the money and pay Bakewell. In pursuance of this arrangement, Judge Bakewell having every confidence, and imposing reliance upon Eoff, whom he had known in former years as a neighbor and with whom he had been socially intimate, employed an auctioneer, Mr. Papin; told him of the arrangement; instructed him as to the amount to bid; never attended the sale. There was no one present at the sale but Papin and the two defendants, no bidders

and the property was bid in by Papin, in the name of plaintiff, for the amount agreed upon.

But for the understanding Bakewell had with Eoff, he would have attended the sale and protected plaintiff's interests, and bid it in as cheaply as he could. Eoff wanted Bakewell to act as his friend, for him and Mr. Ewing in this matter, and see that the property was not sacrificed, and to give them a month's time in which to raise the money; in which to do whatever they wanted to do, raise the money to pay Reel; Reel wanted the money. I understood from what they said that the property was worth a great deal more than the loan, that they had been taken a little short about the matter, but they would look around, and make another loan, and raise the money in some way. Bakewell says he knew nothing about the worth of the property, but the impression made on his mind by Eoff was that the property was worth a great deal more than the loan.

The scope of the conversation I had with Eoff was this: That I was not to knock the property off for a nominal sum, so that Reel would get the property; and that if I would hold it a month, there was no question about it but they would raise the money and pay off the notes. The conversation was conducted on this theory, that here was property worth a great deal more than the loan, and it would be a big thing for Reel if he got the property, and that was exactly what the defendants did not want him to do—to get the property for the loan; that here was a case where Bakewell had the power, that Reel was in the country and there was no way of communicating with him directly; that the property was worth a great deal more than the loan; that it was a hard thing that the property should be knocked down for that amount, and that defendants should lose it, when, if they should raise the money, they would have a big margin, and if it was not paid in thirty days, deed to be taken in John Reel's name.

When Bakewell, at the end of thirty days, Ewing and

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Eoff declining to pay the money, inserted Reel's name in the deed, he still thought from what defendants told him, that it was a hard case on them, that the property was worth more than the loan. Eoff made me believe that the property was worth a great deal more than the mortgage. I thought I had waited on Eoff as long as I could, in justice to Mr. Reel, and Eoff and Ewing were very sorry that they could not pay it, that they could not help themselves, and it had to go; then without consultation with Reel, thinking that the property was ample security, I recorded the deed.

After that, he, Bakewell, thought he had been the victim of complete misrepresentation, which had been palmed off on him under the guise of old friendship. This was when he ascertained the property was not worth the debt.

The other evidence is condensed in the printed brief of respondent, and having examined it in detail in the record, I have found it to be substantially correct, and it is, therefore, inserted here.

John H. Reel, the plaintiff, testified: Was informed by Bakewell and Farish that Ewing, Eoff and Riley wanted the money, and what property they offered as security; something was said about the value of the property and the security that was offered, but I paid no attention to that then; at the time of the loan I knew what the Prairie House was; I had passed it often, and knew what the building was; it is on the St. Charles Rock Road—a brick house. I took the deed of trust and notes down to Messrs. Bakewell & Farish's office, a short time before the trust sale. Ewing, before the sale, told me to have the property bid in for the amount of the indebtedness, and he would return it in thirty days; and, consequently, I instructed Messrs. Bakewell & Farish to bid it in. After the expiration of the thirty days, when the property was mine, and the deed was made to me, then I went to see about it; I went out to look at the place, to see what it was; when they told me they wouldn't redeem it, of course then I consid-

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ered it as mine, and wanted to see what I had got for my money; I found a large house, in a very dilapidated condition, and found a gentleman there.

He placed the property in hands of Bartling, Chambers & Walsh, at one time, for sale, and afterward with Conn & McRee. It took him some time to put out the tenant, whom he found in possession, after he obtained the deed. He has paid taxes and insurance on the property continuously since delivery of the deed and received rent. At the time of the loan, neither Ewing, Eoff nor Riley made any representations to him about value of the property; took possession of the property just as soon as he got the tenant out. "I told the attorneys to get possession as soon as possible—they advised me to do it." Waited two years before bringing this suit, because he didn't like to go to law, and concluded to put up with it until advised by his attorneys to bring suit; he treated the property as his own since delivery of deed, rented it out, received rents and offered it for sale. On February 8th, 1875, Reel wrote the following note to M. P. Sanguinet & Co.:

"Gents: In reply to yours of the 5th, I will sell the Prairie House, 70x192 feet, the same property that I bought of Auguste Ewing & Co., for the sum of \$10,000, one-third cash, the balance in two and three years, with interest at six per cent. on deferred payments.

"JOHN H. REEL."

Did not consult either Ewing or Eoff before making above offer.

Theophile Papin, for plaintiff, testified that he had the property knocked down to Reel, at request of Judge Bakewell, and, on cross-examination, said he thought that, on the 13th day of July, 1873, the property was worth ten or twelve thousand dollars.

Luther H. Conn: Does not think the property sufficient security for loan, but never at any time inspected the building; took possession for Reel in summer or fall of 1873.

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E. G. Obear testified for defendant, that, in May, 1871, he was called upon as an appraiser to inspect the property thoroughly and give it a valuation. He did so, and appraised it at that time at about \$17,000. Marcus A. Wolff and some body else were with him, and \$17,000 was the value of it at that time, and don't think it depreciated any up to August 12th, 1873.

Wm. C. Eoff, one of the defendants, denied that he made any agreement to redeem the property. In July, 1873, when the loan was made, he thought the property was worth \$14,000 at least. He, Ewing and Riley were securities on the bond of Mr. Branham, and in a suit against them—in which the value of this particular property was the subject of investigation in a proceeding in the probate court of St. Louis county, the case was referred to Judge Rombauer. He made his report, wherein he found that this property (July 8th, 1872,) was worth \$14,000, and we, as securities, were held liable for this amount. He was in court when Judge Rombauer made the report, and knew at the time what valuation he had placed on the property; thinks, therefore, he had good reason for believing it was worth that amount, and now thinks it was worth that amount in May, 1871, and August, 1873.

Auguste B. Ewing, the other defendant, denied that he made any agreement to take the property within thirty days, but said that Reel told him that he would buy the property, and they might redeem it within thirty days if they wished; was interested, through his wife, in the Eddy suit against Branham, and knew of the report of Judge Rombauer before he ever had any conversation with Mr. Reel about the property, and also knew the property, and thought that the property, in July, 1873, was worth more than the amount of the mortgage; received the letter from Mr. Reel in June, 1873, demanding payment of the notes.

R. H. Betts, real estate agent, testified that he negotiated the loan after making personal inspection of the

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property. From July, 1872, to August, 1873, this property was worth \$15,000; during the panic of 1873 (in the fall) decreased in value twenty or twenty-five per cent., at least, and such decrease continued down to August, 1875.

M. P. Sanguinet testified: Real estate agent since 1859, and inquired into the value of this property from May, 1871; testified before Judge Rombauer, in the Eddy suit, as to the value of this property; it was worth then \$14,000 or \$15,000, and down to July, 1873, there was no change in its value, except the usual wear and tear of the improvements; during the panic of 1873, middle of September, 1873, down to July, 1875, this property declined in value from twenty to thirty-five per cent.; received the note from Mr. Reel, in evidence, dated February, 1875, offering to sell it at \$10,000. After the party to whom he wished to sell looked at the property, he declined to pay over \$7,000 or \$8,000 for it, because the house was in a worse condition than he supposed.

Marcus A. Wolff testified: Very familiar with the property, live out west of it, and pass by it about 300 times a year; at request of the Eddy children, examined it in the year 1871, and during that year testified before Judge Rombauer as to its value. I valued it then at \$12,225; there was no change in its value to amount to anything down to August, 1873; if anything, it was worth a little more in August, 1873; since August, 1873, the property has depreciated in value, the place has been neglected, and looks a good deal worse than when Mr. Branhams was there in 1873, and do not think the property is now worth over \$10,000; could have got for Mrs. Branhams \$1,800 a year rent for the property. It is a good, large house, substantially built.

This was in substance all the evidence. We have had occasion, during the present term, in the case of *Gillespie v. Stone*, 70 Mo. 505, to consider many of the questions involved in the present case. It is true, that the case of *Gillespie v. Stone*, in its facts, is just the converse of this. That

was a suit by the debtor to be allowed to redeem, upon an alleged agreement with the creditor that he might have an indefinite time for redeeming, whilst this is an action by the creditor to compel the debtor to redeem, after the expiration of the thirty days which it is alleged were allowed him. Both petitions are, however, based upon allegations of an implied trust, growing out of alleged fraudulent representations which prevented competition at the sale, and, therefore, involve the same general principles.

The first thing that must strike any one on reading this testimony is, that there was no agreement proved that the defendants would take the property at the end of thirty days. Eoff and Ewing both deny it in their testimony, and Judge Bakewell does not assert it. The latter states his recollection of the conversation with Eoff to have been, that they would like to have a month to look around and would endeavor to raise the money and take the property. Judge Bakewell readily acceded to this, being under the impression, produced by Eoff's representations, that the property greatly exceeded the amount of the debt in value at that time, which was the 12th day of July, 1873. But on the expiration of the thirty days, which was the 12th day of August, 1873, ascertaining that defendants declined to buy, he inserted his client's name in the deed and had it recorded, and Mr. Reel took possession forthwith. It was immediately after this that Judge Bakewell discovered that he had been imposed on, as he supposed, but his client, the plaintiff, not only took possession, rented it out and paid the taxes, but nearly two years afterward authorized a land broker to sell it, as his property, for \$10,000. Suppose, after this affair was thus closed in the last of July, no commercial "panic," to which the witnesses refer, had occurred in the middle of September, 1873, striking down the value of this and other real estate from twenty to thirty-five per cent., and that, on the contrary, such property had increased in value to the same extent as it in fact decreased, what claim, in a court of equity, would the de-

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fendants have had for a conveyance to them, after the expiration of the thirty days? The "panic" occurred a month after the final conclusion of the defendants, on the 12th day of August, not to take the privilege granted to them by plaintiff, and the plaintiff concluded to take the property at the price he bid. It is clear that, without proof of fraudulent representations, or rather misrepresentations, there was no case, and we concur with the court of appeals that there was not the slightest evidence of any fraud on the part of the defendants. The truth seems to be that the plaintiff was better acquainted with the property than either of the defendants. He had passed the "Prairie House," which was the property in controversy, ever since he was old enough to ride on horse-back. The only information either of the defendants had concerning the value of the property, so far as the record shows, was what they heard from others, and more particularly what they heard in a proceeding in the probate court, in which the value of this property in 1872 became a very material question to them as securities for one Branham, in which proceeding Judge Rombauer, to whom the matter had been referred, after examination of experts, reported the property as worth \$14,000, and they were charged accordingly. This estimate exceeded the debt (\$9,100) by nearly \$5,000. That under such circumstances, the representation of Mr. Eoff to Judge Bakewell should be regarded as fraudulent, or, in other words, a deliberate contrivance to mislead, is not to be thought of.

But judging from the testimony in this case, these opinions or representations of Mr. Eoff were not only not fraudulent and honestly entertained, but in point of fact they were correct. All the real estate dealers who were examined at the trial agreed in this, except Mr. Conn, who had never examined the property, and whose opinion is very much weakened by its going so far as to say that it never was worth the loan on it in 1871; that is, that it was not, in 1871, worth \$8,000. The probate court, however,

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upon the report of Judge Rombauer, based on an examination of all the prominent real estate brokers in the city, declared it worth in 1872 \$14,000. Mr. Conn may be right and the court and Judge Rombauer and the other real estate brokers wrong, but courts must act in such cases upon the great preponderance of the evidence submitted to them. Besides, it is pretty clear that the plaintiff acted himself on these opinions. After he bought the property and ascertained that the defendants had declined to redeem, he waited two years before bringing suit and regarded the property as his absolutely, after as well as before the "panic." He was not certain how it would turn out. Panics are sometimes short-lived. True, the plaintiff alleges as an excuse for not suing that he disliked to go to law, which is not an unreasonable excuse with a sensible man; but why this excuse should not have been as effectual in 1875 as in 1873, does not appear.

Upon the whole, we think the proof of any agreement on the part of defendants was not established. At their request, as an act of courtesy, thirty days were allowed in which the plaintiff consented they might redeem. There was no fraud practiced or misrepresentation made to induce this extension, and we might further say that there was no proof, other than speculative, that any competition was prevented by it, had both the preceding propositions been established, and we might add that two years was too long to wait before taking any steps whatever after the supposed discovery of the alleged frauds. The judgment of the court of appeals is affirmed. The other judges concur.

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fendants have had for a conveyance to them, after the expiration of the thirty days? The "panic" occurred a month after the final conclusion of the defendants, on the 12th day of August, not to take the privilege granted to them by plaintiff, and the plaintiff concluded to take the property at the price he bid. It is clear that, without proof of fraudulent representations, or rather misrepresentations, there was no case, and we concur with the court of appeals that there was not the slightest evidence of any fraud on the part of the defendants. The truth seems to be that the plaintiff was better acquainted with the property than either of the defendants. He had passed the "Prairie House," which was the property in controversy, ever since he was old enough to ride on horse-back. The only information either of the defendants had concerning the value of the property, so far as the record shows, was what they heard from others, and more particularly what they heard in a proceeding in the probate court, in which the value of this property in 1872 became a very material question to them as securities for one Branham, in which proceeding Judge Rombauer, to whom the matter had been referred, after examination of experts, reported the property as worth \$14,000, and they were charged accordingly. This estimate exceeded the debt (\$9,100) by nearly \$5,000. That under such circumstances, the representation of Mr. Eoff to Judge Bakewell should be regarded as fraudulent, or, in other words, a deliberate contrivance to mislead, is not to be thought of.

But judging from the testimony in this case, these opinions or representations of Mr. Eoff were not only not fraudulent and honestly entertained, but in point of fact they were correct. All the real estate dealers who were examined at the trial agreed in this, except Mr. Conn, who had never examined the property, and whose opinion is very much weakened by its going so far as to say that it never was worth the loan on it in 1871; that is, that it was not, in 1871, worth \$8,000. The probate court, however,

upon the report of Judge Rombauer, based on an examination of all the prominent real estate brokers in the city, declared it worth in 1872 \$14,000. Mr. Conn may be right and the court and Judge Rombauer and the other real estate brokers wrong, but courts must act in such cases upon the great preponderance of the evidence submitted to them. Besides, it is pretty clear that the plaintiff acted himself on these opinions. After he bought the property and ascertained that the defendants had declined to redeem, he waited two years before bringing suit and regarded the property as his absolutely, after as well as before the "panic." He was not certain how it would turn out. Panics are sometimes short-lived. True, the plaintiff alleges as an excuse for not suing that he disliked to go to law, which is not an unreasonable excuse with a sensible man; but why this excuse should not have been as effectual in 1875 as in 1873, does not appear.

Upon the whole, we think the proof of any agreement on the part of defendants was not established. At their request, as an act of courtesy, thirty days were allowed in which the plaintiff consented they might redeem. There was no fraud practiced or misrepresentation made to induce this extension, and we might further say that there was no proof, other than speculative, that any competition was prevented by it, had both the preceding propositions been established, and we might add that two years was too long to wait before taking any steps whatever after the supposed discovery of the alleged frauds. The judgment of the court of appeals is affirmed. The other judges concur.

HATCHER et al., Plaintiffs in Error, v. WINTERS.

Equity: ASSIGNMENT FOR THE BENEFIT OF CREDITORS: MISJOINDER OF ACTIONS. The petition stated that one of the defendants executed a deed of assignment to the other defendants for the benefit of all his creditors, including the plaintiffs; that the trustees entered upon the discharge of their trust, but gave no bond, appointed no day nor gave notice thereof, as required by statute; that plaintiffs had, therefore, never presented their demands; that the debtor and one of the trustees afterward entered into an agreement in writing with plaintiffs, who were induced to enter into the same by fraudulent representations on the part of defendants, whereby plaintiffs stipulated for the retention and exclusive control by the debtor of the assets formerly assigned and for other engagements on the part of the defendants, and they, in consideration thereof, agreed to forego their rights under the assignment, and that in case of any violation by the debtor of the terms of the agreement, it should become void. The petition then alleged breaches of this agreement and non-compliance with the representations inducing the same; that the debtor had conveyed to one of the trustees several tracts of land, and that the defendants had failed and refused to exhibit, on oath, a statement of the accounts of their trust to the circuit court. It prayed a rescission of the agreement on account of the fraud alleged, that the deed of conveyance should be set aside as fraudulent, and that the trustees might be required to make to the court a full and detailed statement of their trust. *Held*, that the trial court properly refused to permit plaintiffs to introduce any evidence under their petition; because,

1st, The observance of a stipulation in an agreement between a debtor and part of his creditors, that he should have the exclusive possession and control of goods formerly assigned by him for the benefit of all his creditors, would be fraudulent and avoid the assignment.

2nd, If a debtor, who has previously conveyed to trustees for the benefit of his creditors, afterward conveys to one of the trustees the same land, such trustee would take subject to the assignment, and the creditors would not be prejudiced thereby.

3rd, A suit to set aside, on the ground of fraud, a conveyance by a debtor of land not included in his assignment for the benefit of creditors, should not be joined with a suit for an accounting under the assignment.

4th, If trustees in a deed of assignment for the benefit of creditors fail to discharge their duties, they may be removed by a proceeding at law and others placed in their stead.

5th, Where there was an agreement between a debtor and some of

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his creditors whereby they were to forego the benefits of an assignment by him for the benefit of all his creditors, *Held*, that, if such agreement was valid and he had so violated it as to absolve the other parties from their obligation, they could claim under the assignment with the other creditors, and there would be no occasion for an equitable proceeding to vacate the agreement.

Error to Daviess Circuit Court.—HON. S. A. RICHARDSON,
Judge.

AFFIRMED.

Collier & Mansur for plaintiffs in error.

Shanklin, Low & McDougal and *Stephen Peery* for defendants in error.

HENRY, J.—James Winters, being largely indebted and pecuniarily embarrassed, with a view to secure all his creditors, on or about the 9th day of January, 1871, executed a deed of assignment conveying to Ezekiel L. and Nathan A. Winters, all his property of every kind and description, including all goods, chattels, lands, tenements, bonds, notes and accounts of the firm of James Winters & Son, the said son being N. J. Winters, a minor under twenty-one years of age, who, the petition alleged, had no interest in said firm adverse to said James Winters. The deed excepted from this general assignment the interest of said James Winters in the firm of Winters & De Bolt, a firm composed of said James Winters and K. A. De Bolt; his interest in said firm by a stipulation in said deed was to be applied to the payment of the debts of said last mentioned firm. The said conveyance was for the benefit of all the creditors of said Winters, including plaintiffs in this case. In pursuance of its terms, said trustees entered upon the discharge of their duties under said deed, and proceeded to take charge and make an inventory of the property so conveyed, and to collect the debts so assigned to them, and apply the proceeds in payment of claims against said Winters. They never gave any bond, or appointed a day within

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six months after said assignment, or ever, when they would proceed publicly to adjust and allow all demands against said Winters, by advertising in a newspaper published in Grundy county, or otherwise, pursuant to the statute. Plaintiffs are creditors, but have never presented their demands, because no such notice was ever given.

Defendants, Nathan A. and James Winters, on or about the 10th day of February, 1871, entered into an agreement in writing with Alburtus Scott, John Hatcher, Hugh C. Warren, Davis C. Vincil, Henry Clem, Wilson F. Moore, Emanuel Clem, S. S. Merrill, and David Killburn, reciting the indebtedness of said James Winters to Nathan Winters, and the other parties to the agreement respectively, and the assignment by James Winters, and that the parties to the agreement were all desirous of continuing said James Winters in business, and of enabling him to settle up his affairs to the best advantage, and the said James Winters thereby agreed to pay promptly all the interest on the notes held by the other parties respectively at the end of the year, and also at the end of two years from the date thereof; that he would contract no new indebtedness or liability from and after the date thereof with any person, other than the parties to said agreement, for the space of two years thereafter, or sell any goods or property to any one on credit, who was not good and solvent over and above all exemptions allowed by law, and in consideration of such undertakings by him, the other parties agreed with him, and with each other, that they would forego all their rights and benefits on account of their said debts in said assignment, and forbear to present their claims to said assignees for allowance against the assets assigned, or, for the space of two years, or so long as said James Winters should keep and observe the stipulations on his part, to commence any action or other proceeding to collect or secure their respective claims, or to sell their respective claims to any one without first obtaining the assent of the purchaser to the terms of said agreement, and it was further

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agreed that if said Winters should violate any of the terms of said agreement, it should become void, and any party, after having notified said Winters and the other parties, should be at liberty to take such steps for the collection or security of his demand as he might think proper; and the said Nathan agreed for himself and Ezekiel, that they would proceed with reasonable diligence to settle up all the other demands against James Winters & Son. Said agreement was executed by James Winters, Nathan A. Winters, W. F. Moore, O. A. Scott, Jno. Hatcher, Davis Vincil, H. C. Warren; and by consent, was also signed by S. S. Merrill, Emanuel Clem and David Killburn, creditors of James Winters, whose names by oversight were not inserted in the body thereof.

Plaintiffs, and the other creditors who signed said agreement, were induced to do so on the false and fraudulent representations made to them by Nathan and James Winters that they would at once proceed to remove the stock of goods, then in store at Milan, Missouri, to Lindley, in Grundy county, Missouri, and that the same would be turned over to James Winters, who was to have the exclusive control of the same, and continue the mercantile business at Lindley, and that the said Nathan Winters would, at the same time, advance to James Winters \$3,000 to enable him to carry out said agreement, pay the accruing interest, and finally discharge the indebtedness mentioned in said agreement.

The goods in the store at Milan were of the value of \$4,500, and Nathan Winters, instead of removing them to Lindley, proceeded to sell said goods at auction at Milan, and after so selling goods to the amount of \$1,200, removed the balance to Lindley, and placed the same in charge of the defendant, James Winters, who then resumed business and continued the same for two weeks to about the 1st day of June, when defendant Nathan, again, without the knowledge or consent of creditors who signed said agreement and in violation thereof, resumed control of said goods and

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removed them to Trenton, in Grundy county, and there commenced business on his own account, which he continued up to the institution of this suit, and has not applied the proceeds, or any part thereof, to the payment of the debts of plaintiffs or the other creditors who were parties to said agreement. In violation of said agreement, and contrary to said representations made to induce plaintiffs to make said agreement, Nathan Winters refused to pay to James Winters said \$3,000.

Nathan Winters and James Winters, with the intent further to hinder, delay and defraud plaintiffs as creditors, on the 19th day of May, 1871, made an agreement by which James and wife were to convey to said Nathan several tracts of land of the value of \$8,000, for the pretended consideration of \$5,000, and said deed was made after the execution of the agreement between Nathan and James Winters, and plaintiffs and others. James Winters paid W. F. Moore, O. A. Scott, S. S. Merrill and David Killburn their respective demands in full. Shortly after the execution of said agreement plaintiffs surrendered to James Winters their notes and took in lieu thereof new notes. The real and personal assets so assigned by James Winters were of the aggregate value of \$57,000, and the indebtedness secured thereby \$42,700. Defendants failed and refused to exhibit, on oath, a statement of the accounts of said trust to the circuit court of Grundy county.

The above is an abridgment of the verbose and voluminous petition, the prayer of which was, that the agreement made between James and Nathan Winters and plaintiffs and other creditors named therein, be rescinded on account of the fraud alleged, and also, that the deed from James Winters and wife to Nathan be set aside as fraudulent, and that said assignees be required to make to the court, under oath, a full and detailed statement of the accounts of said trust, and to show cause why they have not executed the trusts confided to them by said assignment. Ezekiel Winters, one of the trustees, was no party to the agreement

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between these plaintiffs and the other creditors set out in the petition.

The agreement itself contained stipulations for conduct on the part of Nathan Winters and James Winters, which would have avoided the deed of assignment if they had been observed. The retention of the possession and control of the goods by James Winters after the assignment, would have been fraudulent, as has been repeatedly decided by this court.

If the lands conveyed to Nathan by James Winters were embraced in the deed of assignment, then Nathan Winters took them subject to the assignment, and this could not, in any manner, have prejudiced the creditors.

If not conveyed by that assignment, he had a right to purchase them, and no fraud in such purchase could in any way affect the assignment, and a suit to set aside the conveyance for fraud would have stated a cause of action separate and distinct from the assignment, and having no relation to it whatever.

If the trustees failed to discharge their duties under the deed, by a proceeding in the circuit court they could have been removed and others appointed in their stead.

If the contract between plaintiffs and Nathan and James Winters was a valid contract, and they had so violated it on their part as to absolve plaintiffs from their obligation under it, then there was nothing to prevent them from claiming under the assignment with the other creditors; so that, as to that branch of the case, there was no occasion for this proceeding to vacate that agreement. The same proof would have been admissible if it had been set up against them on a presentation of their respective demands under the assignment, as would have been competent in a suit to set aside the agreement. The court very properly refused to permit plaintiffs to introduce any evidence under the petition. The judgment is affirmed. All concur.

NEISWANGER V. THE CITY OF KANSAS, *Appellant*.

1. **City of Kansas: ORDINANCES: CITY MARSHAL: FEES.** The common council of the City of Kansas, pursuant to the powers conferred by charter, provided by ordinance that the city officers should receive as full compensation for performing the duties of their respective offices, per annum, to be paid in quarterly installments, in warrants drawn on the city treasurer, as follows: "The city marshal, \$100, and for making an arrest, \$1; for serving a subpoena, twenty-five cents; for summoning a jury, \$1; for serving an attachment, \$1.50; and for serving a notice in condemnation cases, twenty-five cents." "Section 2. The officers entitled to fees by the preceding section will be entitled to receive the same when paid." *Held*, that these provisions did not mean that the marshal could in no case look to the city for the payment of the fee allowed him for making an arrest unless the fee was taxed as cost and paid by the party arrested to the city; that if such had been the intention it ought to have been clearly expressed in the ordinance; and that as without the modification made by the second section, he could only have received his compensation for arrests quarterly, this section was intended to authorize him to receive, in case of arrest, conviction and payment, by the party arrested, of the fine and costs, his compensation for the arrest at the time these costs were thus paid; but that his right to receive from the city the \$1 fee for each arrest was absolute and unconditional.
2. ———; ———: ———: ———. Under an ordinance providing compensation only for making arrests, serving subpoenas, summoning jurors, and serving attachments and notices in condemnation cases, the city marshal was not entitled to compensation for serving notices to appear before the board of equalization.
3. ———: ———: ———: ———. An ordinance provided for the killing of all dogs, not muzzled, found running at large contrary to the orders of the city physician; and authorized the mayor to appoint a person to kill such dogs, who should receive for each dog killed the sum of twenty-five cents. It appeared from the evidence that it was not the intention of the mayor to make such an appointment, but he instructed the marshal to kill the dogs, and to use the police force of the city for this purpose, and that the marshal issued to the police, each night, rations of poisoned meat, and that he cooked and cut up the meat and put poison in it, but the city paid therefor, and the police force distributed it. *Held*, that the police force was to be regarded as an agency of the city and not of the marshal, and that the marshal had not been appointed under the ordinance and was not entitled to receive the fees thereby provided, but a reasonable compensation, only, for his services.

Appeal from Jackson Special Law and Equity Court.—HON.
R. E. COWAN, Judge.

REVERSED.

J. Brumback for appellant.

M. D. Treffen and *Karnes & Ess* for respondent.

NORTON, J.—Neiswanger was city marshal of appellant from the third Monday of April, 1873, to the third Monday of April, 1874. He sued to recover of the city \$1,577.22 for services alleged to have been rendered by him during his term of office. He made eleven different classes of claims, to-wit: *First*, For serving notices in condemnation cases, serving subpœnas and summoning jurors. *Second*, For making 259 arrests for violating city ordinances, where the parties were not convicted before the recorder, nor fined, but discharged for want of proof or other cause, and paid no costs, \$259. *Third*, For making 504 arrests for violating city ordinances, where the parties were convicted and fined by the city recorder, \$504; and for committing such parties to the city work house, in default of payment of fines and costs, \$378. *Fourth*, For making forty-eight arrests for violating city ordinances, where the parties were convicted and fined by the recorder, and appealed from his judgment, \$48. *Fifth*, For serving 145 notices to parties to appear before the city board of equalization of taxes, \$36.25. *Sixth*, for making two arrests, where the parties were taken from him under State warrants, \$2. *Seventh*, For making forty-nine arrests for violating city ordinances, where the parties were convicted and fined by the city recorder, and by the latter permitted to leave the city without paying costs, called stays of execution to leave the city, \$49. *Eighth*, For making three arrests where the parties were convicted and fined by the city recorder, and the common council remitted the fines, \$3. *Ninth*,

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For making four arrests for violating city ordinances, where the parties were convicted and fined by the city recorder, and the mayor of the city remitted the fines, \$4. *Tenth*, For killing 650 dogs, \$162.50. *Eleventh*, For serving eighteen notices on judges of election, for procuring six places for registration and holding election, and for \$2.96 overpaid the city in settlement.

At the trial before the court, without a jury, the city admitted that respondent was entitled to recover for all proved in the first class, and he did not claim anything under the eleventh class, nor the \$378 in the third class for committing persons to the work house. The contest was and is over the other classes, as to which the finding and judgment were for respondent.

The court gave for respondent nine instructions, viz :

2. For the 259 cases charged for in the account, where parties were arrested and discharged for want of sufficient evidence to convict, the court instructs that plaintiff is entitled to recover \$259, if it believes from the evidence that the arrests were made as charged for.

3. For the 504 cases charged for, where parties had been arrested, tried and convicted, and had been sent to the work house, the court instructs that plaintiff is entitled to \$504 for making the arrests in such cases, if the court believe from the evidence that such parties were arrested, tried, convicted and sent to said work house.

4. For the forty-eight cases charged for in the account, where parties had been arrested, tried and convicted, and had appealed, the court instructs that plaintiff is entitled to recover \$48, provided it believes from the evidence the parties were arrested, tried and convicted as charged for.

5. For the 145 notices to appear before the board of equalization, the court instructs that plaintiff is entitled to recover \$36.25, if it believes that such notices were served as charged for.

6. For the two cases charged for, where parties had

been arrested, and they were taken from the marshal on State warrant, the court instructs that plaintiff is entitled to recover \$2, provided it believes from the evidence that said parties had been arrested as charged for.

7. For the forty-nine cases charged for in the account, where parties had been arrested, tried and convicted, and there had been a stay of execution by the recorder, the court instructs that plaintiff is entitled to recover \$49, if it believes such arrests were made as charged for, and that said parties were tried and convicted.

8. For the three cases charged for, where parties had been arrested, tried and convicted, and the fines were remitted by the council, the court instruct that the plaintiff is entitled to recover \$3, therefor, provided it believes from the evidence that such parties were arrested, tried and convicted.

9. For the eight cases charged for, where parties had been arrested, tried and convicted, and the fines were then remitted by the mayor, the court instructs that plaintiff is entitled to recover \$8, provided it believes from the evidence that such parties had been arrested, tried and convicted as charged for.

10. For the killing of 650 dogs, as charged for in the account, the court instructs that plaintiff is entitled to recover \$162.50, provided it believes from the evidence that the mayor instructed the said plaintiff to have the dogs killed, and that they were killed as charged for.

The city excepted to the giving of these instructions. It asked, and the court refused to give, instructions laying down the law differently, as to the nine classes of claims contested. Exception was saved as to such refusal.

It is not material to quote any of the refused instructions, except those as to the claim for killing dogs, which are as follows, viz:

10. The court must find for defendant as to charge in first quarter: To serving 650 dogs killed by order of mayor and city physician, \$162.50.

11. The court must not allow plaintiff anything for killing dogs, unless from the evidence it finds that he killed them, and then only a reasonable compensation, and not more than twenty-five cents a head for each dog killed by plaintiff.

12. If from the evidence the court finds that some other persons than plaintiff killed dogs included in the number of 650 charged for by plaintiff, then it must find for defendant, as to all dogs killed by such person or persons.

13. If from the evidence the court finds that the dogs charged for were killed by poisoned meat, and that the meat and poison were paid for by the city, and prepared for use to poison dogs by plaintiff alone, or plaintiff and some other officer, or officers, or employees of the city, and distributed where the dogs could and did get the same, by the policemen of the city, then no more should be allowed the plaintiff than a reasonable compensation for his services.

The case was submitted on petition, answer and proofs of respondent. The instructions asked by the city, except the 11th, 12th and 13th, are to be considered in substance, that, as to each class of contested claims, on the pleadings and proofs adduced for respondent, the court should find for the city. The court gave judgment for \$1,302.41. A motion for a new trial was overruled, a bill of exceptions setting out all the proof allowed, and the case duly appealed.

The determination as to whether error was committed by the court in giving and refusing instructions, (and which is the only question presented by the record for our consideration,) is dependent upon a construction of certain provisions of defendant's charter and ordinances, as follows: It is provided in article 4, section 18 of the charter: "The city marshal shall, within the city, in all matters arising under the laws of this State, possess the same powers, and perform the same duties, as the constable of Kaw town-

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ship. He shall execute and return all processes issued by the mayor, recorder or justices of the peace, under this act or any ordinance of the city, and shall execute and return all processes issued to him by either of said officers under the general laws of the State. He shall be subject to the orders of the mayor and common council, and may, with the consent of the common council, appoint one or more deputies, and shall perform such other duties as may be prescribed by ordinance, and for such service he shall receive such compensation as may be prescribed by ordinance."

City charter, article 3, section 1, clause 37, gives the common council of the city power by ordinance: "To fix the compensation of the city officers, and regulate the fees of all jurors, witnesses and others, for services rendered under this act, or under any ordinance; *Provided*, that the compensation of no officer of the corporation shall be diminished during his term of office." Mo. Laws 1870, p. 336, clause 37.

Pursuant to these statutory powers the common council, by ordinance of April 14th, 1873, before respondent's term of office began, fixed the compensation of all city officers. That ordinance provides, among other things: "Section 1. That from and after the third Monday of April, A. D. 1873, the officers of the city hereafter named shall receive as full compensation for performing the duties of the respective offices hereafter mentioned, per annum, to be paid in quarterly installments in warrants drawn on the city treasurer, and no more, as follows:" (After naming the mayor and thirteen other officers:) "The city marshal, \$100, and for making an arrest, \$1; for serving a subpœna, twenty-five cents; for summoning a jury, \$1; for serving an attachment, \$1.50; and for serving a notice in condemnation cases, twenty-five cents." "Section 2. The officers entitled to fees by the preceding section will be entitled to receive the same when paid." * * "All fees now taxed as costs against the defendant in the re-

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corder's court according to law, and which had been paid to any officer as part of his compensation, shall be taxed in the same manner hereafter; but so much thereof so taxed, to which officers are not entitled herein as fees, shall be paid by the city marshal into the city treasury."

It is insisted by defendant's counsel that under the above provisions the city marshal can in no case look to

1. CITY OF KANSAS: the city for the payment of the fee of \$1 al-
ordinances: city
m-rshal: fees.

lowed him for making each arrest, unless the fee taxed as cost has been paid by the party arrested to the city, or, in other words, that the right of the marshal to such fee can only be enforced against the party arrested, upon his conviction, and if not collected from him it cannot be charged against the city. This theory, we think, cannot be maintained by any fair construction of the ordinance. If it had been the intention of the city council in fixing the compensation of the marshal to declare that he should receive nothing for making an arrest except in cases where the party arrested was convicted and paid the fine and costs of the arrest, the intention ought to have been clearly expressed in the ordinance. That such intention is not so expressed in the ordinance, is manifest. It is conceded by counsel that, if there was nothing but the 1st section of said ordinance, the right to the dollar for each arrest would be absolute and unconditional, and that the city would be bound to pay, because its officer performed the service officially for it. But it is contended that the following words of the 2nd section "will be entitled to receive the same when paid," was intended to modify the 1st section so as to make the absolute right of the marshal to the fee of \$1 contingent on its being paid by the person arrested if convicted, fined and taxed with such fee as costs.

It will be observed that under the 1st section the compensation of the city marshal for performing the service mentioned therein, was only to be received by him in quarterly installments. One of the services required of the marshal was to make arrests, for which he was entitled as

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compensation to \$1 for each arrest, and without a modification of said section he could only receive his compensation for such arrests quarterly. The language used in section 2, *supra*, that "the officers entitled to fees by the preceding section will be entitled to receive the same when paid," only modifies section 1 so as to allow the city marshal, in case of arrest, conviction of the party arrested and payment of fine and costs by him, to receive his compensation for the arrest at the time the cost is thus paid, without being required to pay the cost so received to the city treasurer and wait two or three months for the quarterly installments, which, but for such modification of said section 1, he would be compelled to do. If the city council had intended the modification of section 1 to have the scope contended for by counsel, it could have been clearly expressed in fewer words, by saying: but such officers shall not be entitled to fees by the preceding section except in cases where they are paid by the party convicted. The modification of section 1 only changes it in regard to the time when the marshal may receive such fees as are paid by the parties arrested who may be convicted. We are, therefore, of opinion that instructions numbered two, three, four, six, seven, eight and nine were properly given.

The exception taken to instruction number five, given on behalf of plaintiff, was well taken, and ought to have

2. —: —: been sustained for the reason that no compensation is provided for the performance of such service as is mentioned therein.

Instructions eleven, twelve and thirteen, asked by defendant and refused, ought to have been given. These

3. —: —: instructions relate to the claim of plaintiff for killing 650 dogs. This claim is based on an ordinance of June 18th, 1873, which, after providing that the city physician may, for certain reasons therein named, make and publish an order, prohibiting for a certain time, all dogs from running at large unless muzzled, also provides: "All dogs found running at large, contrary to

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the provisions of such order, shall be killed, and for that purpose the mayor is authorized to appoint one or more persons whose duty it shall be to kill all dogs found running at large unmuzzled, contrary to the published order of the city physician, and notifying the sanitary sergeant of the same, and for every dog killed, the person or persons performing the duty shall receive the sum of twenty-five cents." The mayor and plaintiff were the only witnesses who testified in regard to killing the dogs, and their evidence is as follows; the mayor said: "I instructed the marshal, Neiswanger, to use the police force in killing dogs running at large; simply instructed him to kill, or to have killed, the dogs; directed him to use the police force of the city to kill the dogs. I thought that a better way than to appoint a dog-killer. Nothing said about the pay, either as to marshal or police. I thought the dogs could be killed that way better than by a dog-killer appointed specially." The plaintiff testified, "that the mayor ordered me to kill the dogs. I issued to the police force each night rations of poisoned meat to be given to the dogs to kill them. The city paid for the meat and poison. I had the meat cooked and cut up, and put the poison with it. I issued it out to the police force from time to time." If, as the evidence indicates, it was the purpose of the mayor not to appoint the plaintiff to kill the dogs, but that the police force of the city should be used for that purpose, and plaintiff simply issued to the police in furtherance of such purpose meat and poison provided and paid for by the city, the plaintiff cannot be considered as having been appointed under said ordinance for the purpose of killing dogs, and the police force is to be regarded as an agency of the city and not of the plaintiff. For the error committed in giving instruction number five, for plaintiff, and refusing to give eleven, twelve and thirteen, asked by defendant, the judgment will be reversed and cause remanded, in which the other judges concur.

THE STATE V. SMITH, *Appellant*.**Indictment Pending Former Indictment for same Offense:**

PRACTICE. The finding of an indictment does not *ipso facto* quash a pending indictment against the same defendant for the same offense. The statute, (Wag. Stat., § 4. p. 1087,) requires that the indictment first found be quashed by the court, and until that is done, the defendant cannot be put upon his trial on the second.

Appeal from Jasper Circuit Court. The case was tried before W. G. MCGREGOR, Esq., sitting as Special Judge.

REVERSED.

The defendant was indicted for assault with intent to kill, but before trial the indictment was stolen from the clerk's office. A new indictment was then found by the grand jury upon which he was tried and convicted. From this conviction he took this appeal.

Chas. A. Winslow for appellant.

J. L. Smith, Attorney-General, for the State.

SHERWOOD, C. J.—Numerous objections are taken to the correctness of the action of the trial court, but as it is unnecessary to notice but one, that one being decisive of this case, we will confine our attention to it. Section 4, page 1087, 2 Wagner's Statutes, provides: "If there be, at any time, pending against the same defendant two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed to be suspended by such second indictment and shall be quashed." We cannot sanction the view of counsel for the State that "the finding of the second indictment under the statute, *ipso facto*, quashed the one theretofore found." It is quite too plain for argument that the statute in question contemplates some action of the court before the first indictment

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"shall be quashed." By reason of finding the second indictment the first is only deemed to be suspended ; it is not quashed, or even deemed to be quashed. If the Legislature intended that the consequences counsel contend for, should follow the finding of the second indictment, they certainly were very infelicitous in the use of language. It may not be amiss, as illustrating our views in this matter, to cite the language of another statute. Section 8, page 72, 1 Wagner's Statutes, states that "where an executor or administrator shall become non-resident, the court having jurisdiction of the estate of the testator or intestate of such executor or administrator, shall revoke his letters." And it was contended in the case of *State v. Rucker*, 59 Mo. 17, that the non-residence of the administratrix, by "operation of law," accomplished the revocation of her letters. But this court held otherwise, holding that judicial action was necessary to effect the result the statute indicates. The same rule of construction is evidently applicable in the present case. It follows, therefore, that the defendant could not have been put upon his trial on the second indictment until the first one had been quashed. And it does not matter that the first indictment had been stolen a few days before, since it would have been easy, under the ruling of this court in *State v. Simpson*, 67 Mo. 647, to have supplied the loss occasioned by the theft, if such supplying was necessary, prior to an order of quash. The judgment is reversed and the cause remanded. All concur.

MISSOURI CITY v. HUTCHINSON, *Appellant*.

Procedure in Municipal Court: CRIMINAL LAW. Under the charter and ordinances of the city of Missouri City, the recorder has no power to issue a warrant of arrest or a summons against one charged with an offense, and no jurisdiction to try him for the offense, until a written or printed statement of the charge has been filed.

Appeal from Clay Circuit Court.—HON. GEO. W. DUNN,
Judge.

REVERSED.

D. C. Allen for appellant.

Respondent not represented.

NORTON, J.—On the 20th day of July, 1874, A. P. Gano, recorder of Missouri City, issued a summons to the constable of the city of Missouri City, commanding him to summon Francis M. Hutchinson as therein directed, which summons is as follows:

The Mayor, Councilmen and Citizens of Missouri City,
vs. *F. M. Hutchinson, Jr., Defendant.* }
Complainants,

The State of Missouri—To the Constable of the city of Missouri City:

Whereas, complaint has been made before me, the undersigned recorder of the city of Missouri City, by Lewis G. Hopkins, constable of said city, that F. M. Hutchinson, Jr., a dealer in drugs and medicines, did directly or indirectly sell or give away intoxicating liquors in a quantity less than one gallon, within the limits of the city of Missouri City, within twelve months from this date—and the same was not sold for medicinal purposes, upon the written prescription or certificate of a regular practicing physician of Clay county that such intoxicating liquor was to be used for medicinal purposes—and such prescription was not given in each or any case of purchase and sale by said F. M. Hutchinson, Jr., and such intoxicating liquors were sold to be drunk on the premises where sold, in violation of section one (1) of an ordinance of the city of Missouri City, entitled, "An ordinance relating to the retailing of spirituous liquors within the limits of Missouri City, Missouri,"—the said F. M. Hutchinson, Jr., being then and there guilty of

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a misdemeanor. These are, therefore, to command you to summon the said F. M. Hutchinson, Jr., that he be and appear before the undersigned recorder of the city of Missouri City, on the 24th day of July, A. D. 1874, at the hour of ten o'clock in the forenoon, at the council room, in the said city of Missouri City, to answer said complaint of the mayor, councilmen and citizens of Missouri City, and be further dealt with in accordance with law, and have you then and there this writ.

Given under my hand this 20th day of July, A. D. 1874.

A. P. GANO, Recorder.

Defendant appeared before the recorder as commanded, was tried, convicted and fined \$20, from which judgment he appealed to the circuit court of Clay county, where, upon trial *de novo* he was found guilty and his fine assessed at \$20, from which he has appealed to this court. On the trial defendant, after having pleaded that the said circuit court had no jurisdiction to hear or determine said cause "because there was not filed with the said recorder, prior to the issue of the summons therein, or at any time, a written or printed statement of the offense charged against him, said defendant, signed by the informer as required by law and the ordinance of said city, nor is there now any such statement in the case," objected to the introduction of any evidence on the part of plaintiff because there was no written statement, as required by the charter, setting forth the offense for which defendant was sought to be made liable; this objection was overruled, and the action of the court in that respect is assigned for error. We are of opinion that the objection was well taken and ought to have been sustained. It is provided in the charter incorporating plaintiff that the recorder of said city shall have exclusive jurisdiction over all cases arising under any ordinance of the city, subject to the right of appeal, and that the practice and proceedings before said recorder for the recovery of fines, &c., for the breach of any city ordinance,

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shall conform in all respects and particulars, as near as may be, to the laws regulating proceedings before justices of the peace. § 15, Acts 1858, p. 229, and § 21, Acts 1858, p. 235. It is also provided in section 23, Acts 1858, page 235, that when any charge is filed by the city attorney against any person as provided in the act, it shall be the duty of the recorder to issue his warrant reciting the charge, &c. It is also provided by section 2 of an ordinance of said city in relation to judicial proceedings, that suits for the recovery of any fine, penalty or forfeiture for the violation of any ordinance of said city may (when it is not otherwise provided) be instituted by filing in the recorder's office or court a written or printed statement of the offense charged, signed by the informer; and no suit shall be dismissed or judgment reversed for any informality in the statement filed in any suit, if such statement shall substantially set out the offense committed and notify the defendant of the charge he is required to answer. Section 4 of said ordinance provides that "upon the filing of such statement the recorder shall enter the cause upon his docket with the names of the parties plaintiff and defendant, and the offense charged, and shall, thereupon, issue a summons or warrant, as the case may require, to the city constable."

It appears from the various sections of the charter and city ordinances that the recorder of said city only has authority to issue either a summons or warrant upon a written or printed statement of the offense charged by the informer and filed with the recorder, or upon a statement filed by the city attorney. Whether the present proceeding is regarded simply as a civil suit or as quasi-criminal, in either view a statement in writing or in print setting forth the offense charged, is required to give the recorder jurisdiction of the subject matter. This is so announced both in the charter and ordinance of the city. The purpose of the required statement is distinct from that of the summons or warrant. The object of the statement is twofold, first, to give the recorder jurisdiction of the subject

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matter, or more accurately speaking, to enable him to determine whether the statement contains a charge which is within his jurisdiction to try, and upon which it is his duty to issue either a summons or warrant; and, second, to enable the person charged to know the nature of the charge preferred. The office of the warrant or summons is to give the recorder jurisdiction of the person and bring defendant into court to answer the charge. The statement when made and filed confers authority on the recorder to issue his warrant; the warrant, when issued, confers authority on the constable to make the arrest, and when the arrest is made its office is at an end, and upon appearance of the party arrested he is to be tried, not on the recitals of the warrant, but upon the statement filed, which conferred the authority to issue it. If no statement is filed, as required by ordinance preferring the charge, there is nothing to try. The case is governed by the principle announced in the case of *City of Kansas v. Flanagan*, 69 Mo. 23. Judgment reversed, in which all concur.

HODGES V. THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY, *Appellant*.

Railroad Crossing: FAILURE TO RING OR WHISTLE: NEGLIGENCE. A switch-crossing provided by a railroad company across its own ground for ingress to and egress from its depot, is not a "traveled public road" within the meaning of section 38, of the railroad act (Wag. Stat., 310). Failure of a train approaching such crossing to ring a bell or sound a whistle does not, therefore, constitute a violation of that section; but whether it may not constitute negligence on the part of the company depends upon the circumstances of the case, and is a question of fact for the jury. (Following *Bauer v. K. P. Ry. Co.*, 69 Mo. 219.)

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Appeal from Clay Circuit Court.—HON. GGO. W. DUNN,
Judge.

REVERSED.

D. C. Allen for appellant.

W. H. Woodson for respondent.

HOUGH, J.—This was an action to recover damages for injuries done to the plaintiff's wagon by one of the defendant's trains at a switch-crossing provided by the defendant across its own ground, for ingress to and egress from its depot near Missouri City, in Clay county. The plaintiff recovered judgment on the ground that it was the duty of the defendant's servants to ring the bell or sound the whistle of the engine before reaching this crossing, and that they failed to do so. It has been recently decided by this court that a crossing like the one in question, is not a "traveled public road or street," within the meaning of section 38, of the railroad act, which requires a bell to be rung or a whistle sounded at a distance of eighty rods from such road or street. *Bauer v. The Kansas Pacific Ry. Co.*, 69 Mo. 219. As it was not the duty of the defendant's servants, under the statute, to ring a bell or sound a whistle before passing the crossing in question, whether it was their duty to do either under the circumstances of the case, or in other words, whether they were guilty of negligence in failing to do either the one or the other, was a question of fact for the jury. The court declared, as a matter of law, that such failure constituted negligence, and in this committed error. The judgment must be reversed and the cause remanded. All concur.

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FINK V. THE CITY OF ST. LOUIS, *Appellant.*

Municipal Corporation : LIABILITY FOR DAMAGE TO ADJOINING PROPRIETOR IN RECONSTRUCTION OF SEWERS. The charter of the city of St. Louis conferred upon the city exclusive control over its own sewers. The general law authorized any railroad company to construct its road along any street of any city in the State, provided the assent of the city was first obtained. The city of St. Louis, by ordinance, gave its assent to the construction of a subterranean railroad along and under one of its streets, but reserved the right, in case it became necessary in the progress of the work to remove any sewer, to supervise and control the work of removal and reconstruction. It did become necessary to remove one of the sewers, which was accordingly removed and reconstructed outside the line of the tunnel which was built for the use of the railroad. Owing to the negligence of the company's contractor in the reconstruction of this sewer, the foundation of a house fronting on the street gave way and the house was greatly damaged. In an action against the city to recover damages for the injury; *Held*, that the city was liable; and the fact that its officers failed to exercise any supervision or control over the work was no defense. It was their duty to have done so.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

This was an action brought against the City of St. Louis and the St. Louis Tunnel Railroad Company, to recover damages for injuries occasioned to plaintiff's property by negligence in making an excavation for a sewer. Plaintiff's property consisted of a dwelling house fronting and abutting upon Eighth street, in said city. The Tunnel Railroad Company was a corporation organized under the general laws of the State, for the purpose of building a subterranean railroad to connect the bridge over the Mississippi river with the railroads leading into the city on the west side of the river. The route of this railroad lay along Eighth street and immediately in front of plaintiff's property. In order to build a tunnel through which the road should run, the company made a deep excavation in the

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street. In making this excavation it became necessary to remove a public sewer which ran down the middle of the street, and to reconstruct it outside of the tunnel wall, and between this wall and plaintiff's house. The negligence complained of occurred in making the excavation necessary for this new sewer, and the injury consisted of the caving in of plaintiff's ground and the cracking and breaking of his walls, whereby the house was made unsafe and plaintiff lost rents.

The statute under which the Tunnel Railroad Company was organized provided that every company organized under it should have power to construct its road across, along or upon any street which the route of its road should intersect or touch, but the company should restore the street to its former state, or to such state as not unnecessarily to impair its usefulness; and that nothing in the statute contained should authorize the construction of a road in, upon or across any street in any city without the assent of the corporate authorities of the city. 2 Wag. Stat., p. 296, §§ 1, 2. The city council of the city of St. Louis passed an ordinance giving its assent to the building of the tunnel railroad in Eighth street. By the 4th section of the ordinance it was provided that if in the course of the construction of the tunnel it should be necessary to cut under or through any main or district sewer, or water or gas pipe, it should be the duty of the company, before severing any such sewer or pipe, to notify the mayor and city engineer, and to reconstruct and rebuild such sewer or pipe in such manner as the mayor and city engineer might direct, and under the supervision of the city engineer. The evidence showed that plans of the work were submitted by the company to the city authorities. On the part of the city evidence was offered to show that the city engineer exercised no supervision or control over the work whatever; but on objection from the plaintiff this evidence was excluded.

For the plaintiff the court instructed the jury as fol-

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lows: If the jury believe that said building or premises were damaged and injured by reason of any unskillfulness or want of due care or precaution in the construction of or excavating for a sewer under the sidewalk in front of said premises on Eighth street, or by reason of any unskillfulness or want of due care or precaution in protecting or providing for the protection of plaintiff's house and premises from injury from such excavation, then the jury will find for the plaintiff against the city. The city prayed the court to instruct as follows: If the jury believe from the evidence that the city did not exercise any supervision or control over the excavation in front of plaintiff's premises, but that said excavation was made by the tunnel company, its contractors and servants, under the supervision and direction of and pursuant to plans prepared by the engineers of said tunnel company, then there can be no recovery herein against the city. But the court refused so to instruct. There was a verdict and judgment for plaintiff against both defendants, from which the city alone appealed to the court of appeals, and, upon affirmance *pro forma* there, again appealed to this court. The giving and refusing of instructions and the exclusion of evidence present the question for decision by this court.

Leverett Bell for appellant.

The city is not liable. The injury was caused by the railroad company in the construction of its tunnel. The authority to do this emanated from the State, as did the power to build, maintain and operate the railroad. The condition annexed by the statute that the consent of the city should first be obtained, was inserted for the protection of the public. It was not intended to create any liability against the city that did not otherwise exist. But for this condition the company could have built without the city's assent. *A. & P. R. R. Co. v. St. Louis*, 66 Mo. 228.

The removal and reconstruction of the sewer was made

necessary by the tunnel, and was a mere incident of that work. The fact that the excavation was made for a sewer, does not impose any liability on the city other than that borne by it in the matter of the excavation for the tunnel. It is not the case of the city undertaking to build a sewer in the first instance. The sewer existed. The duty of the city in relation thereto was fully discharged and terminated. The occupation of the street by the tunnel company required the removal of the sewer. It was removed to answer this end; not to meet any public need. There was no duty imposed upon the city in the premises, and, therefore, no obligation springing from it to the plaintiff.

No part of the work was done by the city, or for the city. It was a private enterprise conducted by a private corporation for the purpose of gain. The city held no interest in the corporation. It received no emolument for granting the use of its streets. It did not even grant such use; the right to occupy the street was granted by the State, subject to the permission of the city being obtained. The railroad company did not act for the city. It was not the agent of the city. The city was not bound by its acts, nor responsible therefor. The city was not a surety or guarantor for the railroad company. It did not undertake to contract that it would be responsible for the acts of the railroad company; and if it had assumed a liability, its assumption thereof would have been invalid, for it had no power to incur such an obligation.

Whether or not there was negligence in the performance of the work, is immaterial, since the work was not done for or by the city, and the relation of principal and agent did not exist between the city and the company. As against the city the damage sustained by the plaintiff is *damnum absque injuria*. *St. Louis v. Gurno*, 12 Mo. 414. Whether there was negligence or not, the city is not liable. *Balt. & P. R. R. Co. v. Reaney*, 42 Md. 117. The fact that the city received an indemnifying bond from the company

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does not tend to fix a liability on the city. *Green v. Portland*, 32 Me. 431; *Murphy v. Chicago*, 29 Ill. 279.

Ed. P. McCarty and Davis and Smith for respondent.

The city is given complete and exclusive control over its sewers. See charter, Acts 1870, p. 480, §§ 11, 12, 13. The excavation for the reconstruction of the sewer was made in the exercise of an express corporate power, and in the performance of a clear corporate duty. For any negligence or unskillfulness in the exercise of such power or duty, the city is liable. *Thurston v. St. Joseph*, 51 Mo. 510; *Wegmann v. Jefferson City*, 61 Mo. 55; *Dillon on Munic. Corp.*, p. 724. The city cannot shift the responsibility upon the railroad company. It had the power by law to annex conditions to its consent that the company should occupy the street. *Wag. Stat.*, p. 297, § 2, clause 4; *Dillon Munic. Corp.*, § 559; *N. C. R. R. Co. v. Baltimore*, 21 Md. 93. It did in fact annex the condition that any sewer which it might become necessary to remove, should be removed and reconstructed in such manner as the mayor and city engineer might direct, and under the supervision of the city engineer. In view of the city's powers and duties in respect of its sewers, and of its own ordinance recognizing and providing for the performance of these, plaintiff insists that the tunnel company, in doing the work of reconstructing said sewer, was the mere agent of the city, and that the city was and is responsible for any neglect or default on the part of said agent in doing said work, and that it is immaterial whether the city did in fact supervise the work or not.

NAPTON, J.—The only question in this case is the propriety of the assumption on the part of the plaintiff, that the city was liable for any negligence in the reconstruction of the sewer on Eighth street although such reconstruction was brought about in the building of a tunnel in the middle of the street, under authority from the State with which

the city had no concern. The petition of the plaintiff is based on two grounds, one of which is, that by the charter of the city the power over all the sewers, &c., of the city is expressly and exclusively granted to the city, and more especially, because ordinance 6442, in section 4, expressly declares that if, in the course of the construction of said tunnel, "it shall become necessary to make an open cut in any street or alley, or cut under or through any main or district sewer, or water pipe or gas pipe, it shall be the duty of said bridge company," (transferred afterward to the tunnel company,) "before removing any sewer, or water pipe or gas pipe, to notify the mayor and city engineer and reconstruct and rebuild such sewer * * in such manner as the mayor and city engineer may direct, and under the supervision of the city engineer." The city contends that the responsibility of making the tunnel was thrown by the State on the tunnel company alone, and the city had nothing to do with it, which is conceded by the plaintiff, and when, in order to get the tunnel, it became necessary to excavate for a reconstruction of the sewer, that also was a consequence of the power granted by the State to construct the tunnel. Neither could be done without permission of the city, for so the law of the State declared, and this permission of the city was in fact accompanied with restrictions that if a change in sewers became necessary, the city authorities had to be counseled in regard to such change, and the work had to be done under the supervision of the city authorities. The circuit court which tried the case, therefore, held that whether the city engineer did in fact superintend the work or not, it was his duty under the ordinance and charter to do so, and the city was responsible for any negligence occasioning injury to the proprietors of adjoining lots. And we think this view of the case was right and in harmony with the authorities. The action is not for damages occasioned by the tunnel, but for an excavation for a sewer, which could only be done by consent of the city and under supervision of the city en-

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gineer. The plans for the work were submitted to the city and approved, and whether its officers supervised its execution or not, was of no consequence, since it was their duty to have done so—a duty imposed by the charter and recognized in the ordinance, and with which the State had no concern and did not attempt to interfere.

The questions in regard to negligence and the amount of damages were submitted to the jury, and no objections are made to the instructions on these points. The only point made in the case is the one we have referred to, and in this our opinion is that the circuit court was right, and, therefore, the judgment is affirmed. All concur.

THE INSURANCE & LAW BUILDING COMPANY V. THE NATIONAL BANK OF MISSOURI, *Plaintiff in Error.*

Landlord and Tenant: COVENANT FOR RENEWAL: COVENANT TO PAY DOUBLE RENT: HOLDING OVER: TENANT'S STATUS. A lease for a term of years contained a covenant for the payment of double rent for every day the tenant might hold over after the expiration of the term, with a further covenant that after such expiration the tenant should have the privilege of renewal for a further term at the same rent as that reserved for the first. The tenant held over for a number of years, paying rent at the old rate. No new lease was executed, neither party requiring it. *Held*, that inasmuch as the tenant had paid the single and not the double rent, he must be taken to have held over under the covenant for renewal, and his liability was the same as if a new lease had actually been executed.

Error to St. Louis Court of Appeals.

AFFIRMED.

Henderson & Shields for plaintiff in error, in argument cited *Taylor on Landlord and Tenant*, § 332; *Thiebaud v. National Bank*, 42 Ind. 212; *Bradford v. Patten*, 108 Mass. 153; *Hunter v. Silvers*, 15 Ill. 174; *Finney v. St. Louis*, 39 Mo. 177; *Bircher v. Parker*, 40 Mo. 119; *Constant v. Abell*,

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36 Mo. 174; *Grant v. White*, 42 Mo. 285; *Hammon v. Douglas*, 50 Mo. 434; s. c., 50 Mo. 442.

Britton A. Hill for defendant in error, in argument cited *Taylor on Landlord and Tenant*, §§ 15, 81, 332, 43, 32; *Kramer v. Cook*, 7 Gray 550; *House v. Burr*, 24 Barb. 525; *Levitsky v. Canning*, 33 Cal. 299; *Delashman v. Berry*, 20 Mich. 292; *Orton v. Noonan*, 27 Wis. 272; *Ranlet v. Cook*, 44 N. H. 516; *Hall v. Spaulding*, 42 N. H. 259; *Bradford v. Patten*, 108 Mass. 153; *Renoud v. Daskam*, 34 Conn. 512; *Woodcock v. Roberts*, 66 Barb. 498; *Creighton v. McKee*, 2 Brews. (Pa.) 383; *Schroeder v. Gemeinder*, 10 Nev. 355; *Falley v. Giles*, 29 Ind. 114.

HOUGH, J.—On the 1st day of May, 1867, the plaintiff leased to the defendant a certain building or banking house in the city of St. Louis, “for and during the term of three years at the yearly rent of \$7,000, payable \$583.33 monthly, when due.” Said lease, which was signed by both parties, contained the following stipulations: “The said lessee, and all holding under it, hereby engage to pay the rent above reserved, and double rent for every day it, or any one else in its name, shall hold on to the whole, or any part of said tenement after the expiration of this lease.” *

* “The said lessee has the privilege of a renewal for ten years more from the expiration of this lease—at the yearly rent of \$7,000, payable monthly.” The defendant entered into possession of the leased premises on the 1st day of May, 1867, and continued in possession for the original term of three years, at the expiration of which time, so far as the record shows, the lessee did not request a new lease, nor did the plaintiff tender a new lease. The defendant, however, continued in possession paying the sum of \$583.33 monthly, just as before, until May 31st, 1876, when, having previously given a month’s notice of its intention to quit, it removed from the premises. The plaintiff refused to accept a surrender, and brought the present suit for the rent accruing subsequently to the removal of the

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defendant. On this state of facts the circuit court held that after the expiration of the three years the defendant was a tenant from month to month, and accordingly gave judgment for the defendant. The St. Louis court of appeals reversed the judgment of the circuit court and gave judgment for the plaintiff, and the defendant has brought the case to this court by writ of error.

It is contended, on behalf of the defendant, that the terms of the lease required the plaintiff to make a new lease at the defendant's option, and that the only effect of the continued occupation of the premises with the consent of the landlord and the payment of rent, was to create, by implication, a new contract of tenancy from month to month under the act of 1869, which, in towns and cities, converts what were previously tenancies from year to year into tenancies from month to month. It is conceded that when the lease provides simply for an extension of the term, at the option of the lessee, nothing need be done by the lessor, and the occupation of the premises and payment of rent constitute sufficient evidence of the lessee's election so to extend the term. But it is insisted that when the lease provides for a "renewal" at the option of the lessee, though for a specified time and at a designated rate, there must be affirmative action by the lessor as well as the lessee; and while the lease for the additional term need not be rewritten and resigned, some new express contract in relation thereto must be made by both parties before the lease can be regarded as having been renewed; and in the absence of such express contract, the only contract existing between the parties is that which the law will imply.

It may well be doubted whether the word "renewal," as employed in the lease before us, implies anything more than an extension of the term. In the case of *Ranlet v. Cook*, 44 N. H. 512, that word was similarly employed, and was construed as being equivalent in meaning to the word "extension." The reasoning of the court of appeals on this subject commends itself to our judgment as being both

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forcible and just. Besides, the formal covenant of renewal usually provides specifically for the execution of a new lease.

The general rule undoubtedly is, that when a lessee for years holds over his term, in the absence of any express contract, the law implies that he is holding over under the terms of the original lease, and it, therefore, makes him a tenant from year to year; but to sustain this implication the acts of the parties must be consistent with such a tenancy. And when the terms of the lease and the conduct of the parties are such as to clearly indicate that the lessee is not holding over under the terms of the original lease, and there is any contract in writing between the parties to which such conduct may be referred, the legal implication of a tenancy from year to year will necessarily be rebutted, and the law will presume that the parties are acting under such contract. Thus, if the acts of the parties are in strict accord with the terms of a renewal provided for in the original lease, and do not conform to the stipulations of the lease so far as they relate to the original term, the law will imply that the lessee is in under the renewal, and he will be held accordingly.

After the expiration of the original term of three years the defendant could only remain in possession of the demised premises in one of two ways: first, by holding over under the terms of the original lease; second, by accepting the terms of the renewal therein provided for. Now, if the defendant declined the privilege of taking the premises for the additional term of ten years, he was bound by the terms of the original letting to pay to the plaintiff for each and every day he remained in possession, after the expiration of three years, double the rent reserved by the original lease. This he did not do. On the contrary, the defendant continued for the period of six years to pay, and the plaintiff to receive, the monthly rents provided for in the clause for renewal, just half the sum the defendant was obligated to pay if the privilege of renewal was not exer-

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cised by it. Under these circumstances we think the defendant is estopped to deny that the term had been extended under the clause of renewal. The judgment of the court of appeals will, therefore, be affirmed. The other judges concur.

. HUMPHREY V. JONES, *Plaintiff in Error*.

1. **Liability of Public Officers on Illegal Contracts Executed on behalf of the Public.** Where the officers of a public or municipal corporation acting officially enter into a contract under an innocent mistake of law, in which the other contracting party equally participates, with equal opportunities of knowledge, neither party at the time looking to personal liability, the officers are not personally liable; and the same rule applies to the officers of a public body which is not a corporation.
2. **Case Adjudged.** Defendant executed a note as director of a public school district, for the benefit of the district, in good faith believing himself authorized to bind the district, and intending to bind it and not himself. The other parties to the note, before it was executed, concluded from an examination of the school law, that the district could be so bound. This proving to be an erroneous conclusion, this action was brought to charge the defendant as maker. *Held*, that he was not bound.

Error to Louisiana Court of Common Pleas.—HON. G. PORTER, Judge.

REVERSED.

In November, 1868, defendant was sole director of school district No. 4, township 54, in Pike county. The district being without a school house, a meeting of citizens was held for the purpose of devising some plan to procure one. Both plaintiff and defendant attended the meeting and participated in its proceedings. It was unanimously agreed by the meeting that the district should borrow money, and defendant was instructed to draw up and sign the note for the district. Acting upon this instruction, he

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executed the instrument set out in the opinion of the court. A copy of the school law was examined at the meeting and generally discussed, and it was agreed that the director had power to borrow money and execute the note of the district. It was the understanding of all present that the note was the note of the district, and that the district was bound for its payment. Plaintiff testified that this was his understanding. The party of whom they proposed to borrow the money refused to loan to the district without security, and thereupon plaintiff and the other parties whose names appear upon the note, signed as sureties for the district. Afterward, the district failing to pay plaintiff and another one of the sureties paid off the note, and plaintiff brought this suit against defendant for his proportion of the amount paid.

Elijah Robinson for plaintiff in error, cited in argument *Dillon on Munic. Corp.*, p. 213; *Musser v. Johnson*, 42 Mo. 74; *McClellan v. Reynolds*, 49 Mo. 312; *McGee v. Larra-more*, 50 Mo. 425; *Klostermann v. Loos*, 58 Mo. 290; *Smout v. Ilberry*, 10 Mees. & Wels. 1; *Stone v. Huggins*, 28 Vt. 617.

Henry Flanagan, *W. H. Biggs* and *Cyrus Smith* for defendant in error.

The vice of the contention of the plaintiff in error is, that he assumes the existence of a corporation, whose agent he claims to have been, when no such corporation existed at the time the note was made. No principal being in existence, against whom the note could be enforced, the defendant, with the others who signed it, became personally liable to pay it. If a person assumes to act as the agent of another, or of a corporation, it is his duty to see that there is a principal in being, who is to be bound by his acts. *Hurt v. Salisbury*, 55 Mo. 310; *Lapsley v. McKinstry*, 38 Mo. 245; *Stone v. Wood*, 7 Cow. 454; *Tippets v. Walker*, 4 Mass. 595.

Humphrey v. Jones.

On Rehearing.

SHERWOOD, C. J.—The original opinion in this case was based upon an assumed similarity between it and the one which it apparently followed. Upon a more careful examination of the two cases, however we find them totally unlike in facts and consequently the law applicable to them. In the former case there were three directors, who endeavored to bind the school district by separate action, and not as a board; and we held the district could only be bound by the directors when strictly acting within the limits of their official capacity. Here, there, is but one director, and the question is, whether he, having failed to bind the school district by the contract which he signed, is himself individually bound thereby. The note sued on is in this form:

\$700.

NOVEMBER 3d, 1868.

One day after date I, as director of sub-district No. 4, township 54, promise to pay to George T. Pitzer, or bearer, the sum of seven hundred dollars, value received, negotiable and payable without defalcation or discount, with interest from date at the rate of ten per cent per annum. William Jones, director of sub-district No. 4, T. 54, R. 1, Pike county, Missouri.

Signed

GEORGE K. PITZER,
FOSTER HILL,
AZAKIAH HUMPHREY,
MARTIN HANEY.

It is conceded on all hands that the utmost fairness characterized the transactions, which resulted in the execution of the note by the defendant. Neither that instrument, nor the evidence adduced at the trial give the slightest countenance to the idea that Jones intended to be bound or that those who urged and directed him to execute the note, intended him to assume any personal obligation. At the "meeting," called for the purpose of

raising the necessary amount to build the school house, and at which meeting the plaintiff, who acted as secretary, as well as the other signers of the note were present, Jones was directed to draw up and sign the note "so as to bind the district." "It was intended as a district note and the agreement was that the note was executed as the note of the district." A copy of the school law was in use at the meeting, and all participated in reading it, and arrived at the unanimous conclusion that the district could be bound in the manner attempted.

We have no doubt that the construction of section 6 of the school law, (Acts 1868, p. 166), was an erroneous one. The question then is, how stands the case with the defendant. Is he bound by the note or not? In *Smout v. Ilberry*, 10 Mees. and Wels. 1 (a leading case), Mr. Baron Alderson, in discussing the general principles applicable to all agents, divided the liabilities of agents into three classes: 1. Where the agent makes a fraudulent representation of his authority with intent to deceive. 2. Where he has no authority and knows it, but nevertheless makes the contract as having such authority. 3. Where not having in fact authority to make the contract as agent, he yet does so under the *bona fide* belief that such authority is vested in him, as in case of an agent acting under a forged power of attorney which he believes to be genuine, and the like; and he remarked: "On examination of the authorities, we are satisfied that all the cases in which the agent has been held personally responsible, will be found to arrange themselves under one or other of these three classes. In all of them it will be found, that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party, as would enable him, equally with himself, to judge as to the authority under which he proposed to act." Applying the principles announced in that case to the present case, we find no

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room to question that it falls within the third subdivision, or class above noted, for here it is shown beyond all cavil or dispute, that no fraud or concealment was used by defendant, because he took his copy of the school law to the meeting, and all of those present read it for themselves. Hence no omission to give information can be laid to his charge, as the means of that information to-wit, the school law, was equally accessible to all.

Mr. Justice Dillon, in a note to section 176, in his work on municipal corporations, says: "It is held, that where the officers of a public or municipal corporation acting officially, and under an innocent mistake of the law, in which the other contracting party equally participated with equal opportunities of knowledge, neither party at the time looking to personal liability, the officers are not in such case personally liable, nor is the corporation liable." And numerous authorities are cited by the learned author, which announce that doctrine. This view of the subject accords well with our own adjudications. *Klostermann v. Loos*, 58 Mo. 290 and cases cited. Nor do we think it affects the principle under discussion, that there was not in reality under the law of 1868, any such corporation as that mentioned in the note now in suit. Holding these views, we reverse the judgment. All concur.

PORTER V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY,
Appellant.

1. **Master and Servant:** THEIR RESPECTIVE DUTIES TOUCHING MACHINERY FURNISHED BY MASTER TO SERVANT: DEFECTS, LATENT: DEFECTS, PATENT. A brakeman, while engaged in coupling cars at night, stepped into a hole under a tie, by which his foot was caught and he was thrown under the moving car which passed over his legs, causing serious and permanent injuries. The defect in the road was not patent, but required inspection to discover it, and he had never worked on this portion of the track before. His attention had been

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called to the generally unsafe and dangerous condition of the track, but not to the specific defect causing his injuries. He was ignorant of its existence, and the attention of the servants of the railroad company, whose duty it was to attend to the track, had more than once been called to its dangerous condition, but they had taken no steps to repair it. In an action brought by him to recover damages for the injuries sustained; *Held*, that the following rules are well settled:

1. A master is not an insurer of the safety of his servant, and is under no absolute obligation to provide for him safe machinery and implements, or to keep these in good order and condition; but it is his duty to use reasonable care and precaution for these purposes.
 2. If there are defects in the machinery or implements, known to the servant, and he will, notwithstanding, enter into the master's service, he takes upon himself the risk incident to such defects.
 3. It is not incumbent upon the servant to search for latent defects in machinery or implements furnished him by his employer, but he has, without any investigation, the right to assume that they are safe and sufficient for the purpose.
 4. In case of a patent defect, or such as the servant, if ordinarily observant, would have discovered by his ordinary use of the machinery or implement, his opportunity to know would be held as knowledge, whether in fact he knew of the defect or not.
 5. If the servant of a railroad company appointed to keep the track in repair, knows, or by the proper discharge of his duty might know of its condition, then his knowledge, or that which he might have acquired, is imputable to the company.
2. — : —. Although a servant may have had equal means with his master of ascertaining defects in machinery or implements provided by his master, this will not necessarily preclude him from recovering damages from his master for injuries received by him consequent upon such defects, if, in fact, he was ignorant of their existence, and they were not patent, or such as would have been disclosed to him, if ordinarily observant, by his actual and ordinary use of such machinery or implements. He has a right to assume that the machinery and implements furnished him by his master are safe and suitable for the business, and he is not, while the master is, required to examine them for that purpose.
3. **Damages, Mental Pain and Anguish as Elements of.** In actions under statutes giving a right of action to the relatives of a deceased person for his death, the damages recoverable are only such as are pecuniary and actual, or fixed in amount by the statute; but in actions brought by the parties injured themselves, mental pain and anguish are also proper elements of the damages, although no malice or wantonness be charged.

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4. **Damages, not Excessive.** There were three verdicts in this cause—the first for \$10,000, the second for \$12,000, and the third for \$10,000; *Held*, that this court could, with no propriety, say that the latter verdict was excessive.

Appeal from Clinton Circuit Court.—HON. GEO. W. DUNN,
Judge.

AFFIRMED.

Geo. W. Easley for appellant.

1. The defect through which the plaintiff claims to have received his injury being an open and obvious one, which any person, by the use of his ordinary faculties, could have observed and avoided, the plaintiff assumed the risk of injury from such defect. *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521, 532; *De Graff v. R. R. Co.*, 3 T. & C. (N. Y.) Sup. Ct. 257, 255; *Cagney v. H. & St. Jo. R. R. Co.*, 69 Mo. 416; *Smith v. R. R. Co.*, 69 Mo. 38, 32; *McGlynn v. Brodie*, 31 Cal. 376; *Stone v. Oregon Manfg. Co.*, 4 Oregon 52, 56; *Hayden v. Smithville Manfg. Co.*, 29 Conn. 548, 560; *Hulett v. St. Louis, K. C. & N. Ry.*, 67 Mo. 239; *Devitt v. R. R. Co.*, 50 Mo. 305, 302; *Dale v. R. R. Co.*, 63 Mo. 455; *Assop v. Yates*, 2 Hurl. & Nor. 768; *Dyner v. Leach*, 26 Law Jour. 221; *s. c.*, 40 Eng. Law & Eq. 491; *Senior v. Ward*, 102 Eng. C. L. 385; *Griffiths v. Gidlow*, 3 Hurl. & Nor. 648; *Watling v. Oastler*, Law Rep. 6 Exch. 73; *Patterson v. Wallace*, 28 Eng. Law & Eq. 48; *Skip v. R. R. Co.*, 24 Eng. Law & Eq. 396; *Seymour v. Maddox*, 16 Q. B. 316; *Ladd v. R. Co.*, 119 Mass. 412.

2. No evidence was offered to show that defendant knew or ought to have known of the existence of the gully or hole by which plaintiff was thrown down and injured. If we are to be held to knowledge of the particular defect by proof the knowledge of the general character of the side track, shall not proof of knowledge on the part of the plaintiff of the same general character be held as knowledge to him of the particular defect also? Negli-

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gence cannot be presumed against us from the fact of the injury, but the burden of proving it is on the plaintiff. *Shultz v. R. R. Co.*, 36 Mo. 13, 32. And there is not a particle of evidence to show that this hole had existed a sufficient length of time to have made it the duty of defendant or any of its agents to have discovered the same. It may only have been there a few hours before the accident. The law presumes that the company has performed its duty and this presumption must be overcome by the evidence before there can be any recovery. *Wood, Master and Servant*, § 368.

3. The action being founded on a breach of the implied duty of the master to use care to provide a safe track, the damages for a breach thereof, no wantonness or malice being charged, should have been confined to the pecuniary loss. Mental pain and anguish were not proper elements of the damages. *Johnson v. Wells*, 6 Nev. 224; *Fay v. Parker*, 53 N. H. 359; *Blake v. Midland Ry.*, 10 Eng. Law & Eq. 437; 2 Greenleaf Ev., 267; *Flemington v. Smithers*, 2 Car. & Payne 292.

4. The damages are excessive, being twice the amount the defendant would have been liable for had death ensued, and the amount recovered being placed at interest would realize twice as much as the record shows the plaintiff could earn. *Bridge Co. v. Loomis*, 20 Ill. 235; *Railroad Co. v. Welch*, 52 Ill. 183; *Collins v. R. R. Co.*, 12 Barb. 500; *Murray v. R. R. Co.*, 47 Barb. 205.

Allen H. Vories for respondent.

1. It was not the duty of plaintiff, nor in his power, nor did he have the opportunity, nor skill, to know the defects of the track on which he was injured. And without investigation, he had the right to rely upon the presumption that his employer had furnished him an ordinarily safe track on which to work. *Snow v. H. R. R. Co.*, 8 Allen 441; *Seaver v. Boston & M. R. R. Co.*, 14 Gray 466; *Gibson*

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v. Pacific R. R. Co., 46 Mo. 163; *Brothers v. Cartter*, 52 Mo. 372; *Devitt v. Pacific R. R. Co.*, 50 Mo. 302; *Porter v. H. & St. Jo. R. R. Co.*, 60 Mo. 160; *Dale v. The St. L., K. C. & N. Ry. Co.*, 63 Mo. 455, 459.

2. It was defendant's duty to provide plaintiff, as its servant, good, safe and properly constructed tracks adapted to the carrying on of its business, to use all reasonable care and precaution for plaintiff's safety, and the degree of care must be proportionate to the dangerous nature of the machinery used. *Gibson v. P. R. R. Co.*, 46 Mo. 163; *Kennedy v. N. M. R. R. Co.*, 36 Mo. 351; *Porter v. H. & St. J. R. R. Co.*, 60 Mo. 160; *Lewis v. St. L. & I. M. R. R. Co.*, 59 Mo. 495; *Keegan v. Kavanaugh*, 62 Mo. 232; *Whalen v. Centenary Church*, 62 Mo. 326; *Dale v. The St. L., K. C. & N. Ry. Co.*, 63 Mo. 455; *Cayzer v. Taylor*, 10 Gray 274; *Castle v. Duryea*, 32 Barb. 480; *Morgan v. Cox*, 22 Mo. 373; *Ryan v. Fowler*, 24 N. Y. 410; *McDermott v. P. R. R. Co.*, 30 Mo. 115; *Gorman v. P. R. R. Co.*, 26 Mo. 441.

3. If the agents of the defendant whose duty it was to keep the track in repair, knew of its defects and improper construction, the knowledge of such agents was the knowledge of defendant. *Harper v. St. L. R. R. Co.*, 47 Mo. 567; *Brothers v. Cartter*, 52 Mo. 372; *Lewis v. St. L. & I. M. R. R. Co.*, 59 Mo. 507.

4. The ninth and tenth instructions, asked by defendant, were properly refused. Plaintiff had neither the time, skill nor opportunity, nor was it his business to examine for defects in defendant's track. The defendant had men employed whose business it was to examine said track and see to its repairs. Even a knowledge on the part of the plaintiff of the defect complained of is not of itself an answer to the action. *Laning v. N. Y. Cent. R. R. Co.*, 49 N. Y. 536; *Huddleston v. Lowell Machine Shops*, 106 Mass. 286; *Dale v. The St. L., K. C. & N. Ry. Co.*, 63 Mo. 455; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Gibson v. Pacific R. R. Co.*, 46 Mo. 163; *Porter v. H. & St. J. R. R. Co.*, 60 Mo. 160.

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5. Where two juries have passed upon the question of damages, to set the second verdict aside upon the ground of excessive damages, would be "usurpation of the province of the jury." *Goetz v. Ambs*, 27 Mo. 28; *Kennedy v. North Mo. Ry. Co.*, 36 Mo. 351; *Whalen v. St. L., K. C. & N. Ry.*, 60 Mo. 329; *Dale v. St. L., K. C. & N. Ry.*, 63 Mo. 455; *Graham v. Pacific R. R. Co.*, 66 Mo. 536.

HENRY, J.—This suit was instituted in the Buchanan circuit court by plaintiff, an employee of the defendant, to recover damages for an injury sustained by him while engaged as a brakeman, in consequence of a defective track which it is alleged in the petition, was on the 5th day of March, 1873, and for a long time prior thereto had been entirely unsafe and extremely dangerous to defendant's employees, of which defendant had notice and plaintiff was ignorant.

The evidence for plaintiff tended to prove, and we think proved, the condition of the track to have been as alleged by plaintiff. The ties upon which the rails rested were not covered, nor were the spaces between them filled. Gullies and ditches had been washed in the road, and there was an irregularity in the distances between the ties. In some places holes had been washed under the ties, and in coupling cars on the night of the 5th day of March, 1873, plaintiff's foot was caught in a hole under a tie, by which he was thrown down and a car passed over his legs producing injuries which necessitated the amputation of one of his legs below the knee and two toes of the other foot. This defect in the road was not patent, but it required inspection to discover it. The plaintiff boarded at the Huxley House, on a street parallel with the road, and in passing from that house along the sidewalk to defendant's yard, in which plaintiff was at work, obstructions and other defects in the road were observable, but the particular defect which occasioned the injury to plaintiff was not. He was ignorant of its existence, and the

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evidence showed that more than once before the accident occurred, the attention of the servant of the company whose duty it was to attend to the tracks and keep them in order, was called to the dangerous condition of the track, but no steps were taken to repair it. His attention was not called to the specific defect in the road here complained of, but to its general unsafe and dangerous condition. It was the duty of the company to its employees, to exercise reasonable precautions to keep its track in a reasonably safe condition, and we think the evidence abundantly shows, that, by the exercise of even the lowest degree of care, they would have ascertained this defect, and removed it. There was conflicting evidence as to the general condition of the track, but as to the existence of the specific defect which occasioned the injury to plaintiff there was not; neither was there any evidence to show that from the sidewalk it was observable.

For plaintiff the court gave the following instructions:

1. It is admitted by the pleadings in this case, that at the time mentioned in plaintiff's petition the defendant was a railroad corporation, operating its railroad from Hannibal to St. Joseph, Missouri; and that for the purpose of carrying on its business, said defendant had erected depots and laid out tracks, switches, side tracks and other tracks in the said city of St. Joseph.

2. It was the duty of defendant in prosecuting its business and in the construction of its tracks, to use and exercise care, skill and caution to protect the lives and persons of its employees; and the degree of care must be proportionate to the dangerous nature of the means, instruments and machinery used.

3. If the jury believe from the evidence that plaintiff, by contract with defendant, entered into her employ as a brakeman in her yards in the city of St. Joseph, to do and perform such work as was required of him as such employee, then the law presumes that in accepting such work he only assumed the ordinary risk or danger of such

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employment, and did not assume or contract with reference to any risk or danger arising or resulting from an improper or defective track used by defendant in the prosecution of its business, unless he, plaintiff, knew of the defects and dangers, and the increased dangers arising from such defects.

4. If the jury believe from the evidence that the agents of the defendant, whose duty it was to construct and keep in repair the defendant's tracks, knew of the improper construction of said track, and of its dangerous condition or its want of repair, if such improper or dangerous condition existed, then such knowledge is the knowledge of defendant.

5. If the jury believe from the evidence that the injuries of plaintiff resulted from the failure of defendant to provide a suitable and reasonably safe track upon which its employees might transact the ordinary business of their calling, then such injuries so received by plaintiff were not the result of the risk and danger assumed by plaintiff when he entered into defendant's service, or naturally incident thereto.

6. If the jury believe from the evidence that whilst plaintiff was in the employ of defendant as a brakeman, and in the line of his duty as such, and in and about the business of defendant under the control and direction of her agents, he received the injuries complained of, about the 5th day of March, 1873, and that said injuries resulted from the use by defendant of its railroad track, which was improperly constructed, and not reasonably safe and suitable for the carrying on of its business, and which might have been prevented by ordinary care and precaution on the part of defendant, and that defendant knew of such defects through her agents, or might have known thereof by the exercise of reasonable care and diligence, then they, the jury, will find for plaintiff, if they believe from the evidence that he was, at the time of said injuries, exercising ordinary care and prudence, and did not know of the

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defective and improper construction of said track, and the increased exposure to danger on account of such defects.

7. If the jury find for the plaintiff they will assess his damages at such sum as they believe from the evidence he has sustained, taking into consideration the pain and anguish, mental and physical, the loss of his leg and other injuries sustained, not to exceed twenty thousand dollars.

For defendant the following were given: 1. Unless the jury believe from the evidence that the track in proof was not reasonably safe for the purposes for which it was used, and that plaintiff received the injuries sued for by reason of such unsafe condition of said track, they will find for defendant.

2. A railroad company is under no obligation to provide for its employees the best or safest track that can be constructed, but all that is required is that the company shall use ordinary care in the construction of its tracks, and that said tracks shall be ordinarily or reasonably safe for the purposes for which they are used. And if the jury believe from the evidence that defendant did use ordinary care in the construction and maintenance of the track in proof, or that said track at the time of the injuries sued for was reasonably safe for the purposes for which it was used, they will find for the defendant, although they may believe from the evidence that said track could have been made safer than it was.

3. If the jury believe from the evidence that the injuries sued for happened from the rapid motion of the cars in proof, or from the plaintiff's attempting to couple said cars while they were in so rapid motion as to make it imprudent to do so, they will find for defendant.

4. If the jury believe from the evidence that the injuries sued for happened by reason of the cars in proof striking plaintiff and knocking him down, they will find for defendant.

5. If the jury believe from the evidence that the injuries sued for were directly caused, in whole or in part,

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by plaintiff's own carelessness, unskillfulness, or negligence, they will find for defendant.

6. If the jury believe from the evidence that plaintiff by his own carelessness or unskillfulness contributed to the injuries sued for, or that by the exercise of ordinary skill, care or prudence on his part, the accident would not have happened, or could have been avoided, they will find for defendant.

7. Although the jury may believe from the evidence that the hazard of plaintiff's employment was increased by the dangerous condition of defendant's yard and track, and the plaintiff at the time of his employment was informed of the fact, yet plaintiff, by accepting such employment, assumed the increased risk, and cannot recover in this action for injuries received on account of such dangerous condition of the yard or track.

8. Although the jury may believe from the evidence that the yard and track in proof were not ordinarily safe, yet if they also believe from the evidence that the plaintiff, before he was injured, knew of the said condition of said yard and track, and of the danger to which said condition of said yard and track exposed him, and afterward continued in the employment of defendant, and was injured in consequence of the condition of said yard and track, they will find for defendant.

The following asked by defendant were refused: 9. If the jury believe from the evidence that plaintiff, before he was injured, knew, or by ordinary care and prudence on his part, could have known that the ties on the track where plaintiff was injured, were not filled in between, and that there were obstructions along the side of the said track, and that plaintiff was injured by reason of said ties not being filled in between, as aforesaid, and by reason of said obstructions, the jury will find for defendant.

10. If the jury believe from the evidence that the defects in the track in proof, and the obstructions along side the same, were open to ordinary observation, and that

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the plaintiff by the exercise of ordinary care and attention might have known of such defects and obstructions before he was injured, they will find for defendant.

11. If the jury believe from the evidence that plaintiff was informed by the person who employed him to work on defendant's yard, that the same was very dangerous, and they also believe that plaintiff was injured on one of the tracks in said yard, they will find for defendant.

12. The court instructs the jury that the plaintiff, when he contracted with the defendant to work as brakeman in defendant's yard, contracted to have ordinary skill and information concerning the duties of a brakeman, and if the jury believe from the evidence that a brakeman of ordinary skill and information would have known the danger to be apprehended from running ahead of moving cars upon the center of the railroad track in the condition of the track in proof, as sworn to by plaintiff, on a night of the character of the night in proof, then they will find for defendant if they further believe from the evidence that plaintiff was injured as complained of by running ahead of moving cars as aforesaid.

13. Under the pleadings and evidence in this case, the plaintiff cannot recover, and the jury must find for the defendant.

15. If the jury find for the plaintiff, they will, in assessing damages, take into consideration the want of caution, if any, of plaintiff, and the knowledge he had of the dangerous condition of the track in proof, if they believe from the evidence that he had any such knowledge, and all other facts and circumstances in the case, as shown by the evidence.

It is the duty of the employer to provide for his servants, good, safe and properly constructed machinery and implements for carrying on his business, and to use reasonable care and precaution for the safety of the employees. By this, however, it is not meant that he is an insurer of their

1. MASTER AND
SERVANT: their
respective duties
touching machin-
ery furnished by
master to servant:
defects, latent:
defects, patent.

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safety and under an absolute obligation to provide safe machinery and implements, but only that he is to use reasonable care and precaution in procuring them and keeping them in good order and condition.

There is no well considered case, which holds the employer to a stricter liability. This rule is subject, also, to qualifications which make the master's liability even less. If the defect in the machinery or implement be known to the employee, and he will still enter into the employer's service, he takes upon himself the risk incident to such defect, and cannot recover damage for an injury he may receive, attributable to such defect. In support of these propositions we refer to *McDermott v. Pac. R. R. Co.*, 30 Mo. 115; *Gibson v. Pac. R. R. Co.*, 46 Mo. 163, 169; *Lewis v. St. L. & I. M. R. R. Co.*, 59 Mo. 504; *Keegan v. Kavanaugh*, 62 Mo. 232; *Dale v. R. R.*, 63 Mo. 455; *Devitt v. R. R.*, 50 Mo. 305; *Cummings v. Collins*, 61 Mo. 520; *Smith v. R. R.*, 69 Mo. 32; *Hayden v. Smithfield Manf. Co.*, 29 Conn. 548; 10 Ind. 554; 28 Vt. 59; 29 N. Y. 383; 5 Barb. 541; 39 N. Y. 468; 25 N. Y. 478; 49 Barb. 328; 62 Barb. 218. There are observations in the opinions of the court in *Gibson v. Pac. R. R. Co.*, and *Lewis v. The St. L. & I. M. R. R. Co.*, which are frequently cited as maintaining a different doctrine; but those general remarks are subsequently, in the same opinions, so qualified as to harmonize those cases with the general current of authority.

We think it equally well settled, that it is not incumbent upon the employee to search for latent defects in machinery or implements furnished him by the employer, but, that without such investigation he has the right to assume that they are safe and sufficient for the purpose. *Lewis v. St. Louis & I. M. R. R. Co.* 59 Mo. 506; *Porter v. H. & St. Jo. R. R. Co.* 60 Mo. 160; *Gibson v. Pac. R. R. Co.* 46 Mo. 163; *Ford v. R. R. Co.* 110 Mass. 240; *Snow v. R. R. Co.* 8 Allen 441.

If, however, the defect is patent, open to observation, or such as the ordinary use of the machine in the business

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the servant is engaged in would disclose to an ordinarily observant man operating it, and the servant had ample opportunity, by operating it, before being injured, to observe the defect, his opportunity to know would be held as knowledge, whether in fact he knew of the defect or not. *Keegan v. Kavanaugh*, 62 Mo. 232; *Hulett v. St. L., K. C. & N. Ry. Co.* 67 Mo. 239.

If the agent or servant of the defendant appointed to keep the track in repair knew, or by the proper discharge of his duty might have known its condition, then the knowledge the agent had, or might thus have acquired, is imputable to the master. *Harper v. Ind. & St. L. R. R. Co.* 47 Mo. 567; *Lewis v. St. L. & I. M. R. R. Co.* 59 Mo. 506. In the latter case the court observed, Wagner, J.: "It was the duty of the section foreman to keep the track in repair and see that every thing was safe. He was notified of the existence of the hole, and complaint was made to him about it, but he negligently omitted to act and failed to remedy the defect. Notice to him was notice to the company, and his negligence was the company's negligence."

In *Hayden v. Smithfield Man'f. Co.* 29 Conn. 548, Ellsworth, J., delivering the opinion of the court, said: "From 2. —: —. the best consideration I can give the English cases, I am satisfied that the law in England is as expressed by Barnwell, Baron: 'I believe an employee cannot recover for an injury suffered in the course of his business from defective machinery, unless the employer knew, or ought to have known the fact, and the employee did not know it, or had not equal means of knowing it.'" The latter clause of this extract, exempting the employer if the servant had equal means of knowledge is in conflict with the case of *Porter v. H. & St. Jo. R. R. Co.* 60 Mo. 160. The doctrine that the servant cannot recover if he had equal means with the master of ascertaining the defect, is not applicable to a case of latent defects in machinery, but only to cases where the defect is obvious to the senses, or would have been disclosed to an ordinarily observant man

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in the ordinary use of the machinery in the business the servant was engaged in within the time the injured servant operated such machinery before the accident, or in the case of the negligence of a fellow servant and probably others, but certainly not to the one now under consideration, if we adhere to the doctrine announced in this case, when here on a former occasion. If the servant, as was then held, is not, and the master is, required to exercise diligence to discover defects in machinery with which the servant is employed to work, the latter may recover, although he may have had equal means of ascertaining its defects, if in fact he was ignorant of their existence and they were not patent, or such as would have been disclosed by operating it as above stated.

If the master did not know of the defect, and reasonable care on his part would not have disclosed it, he would not be liable. If, however, by the exercise of reasonable care the employer could have discovered, although a like exercise of care on the part of the servant would also have disclosed to him a latent defect, yet if in fact he did not know it, the master would be liable, although the servant's opportunities to ascertain it were equal to those of the master. The servant has a right to assume that the machinery or implements furnished him by the employer are safe and suitable for the business, and he is not, while the master is, required to examine them for that purpose. The master is chargeable with knowledge which he might have acquired by the exercise of due care, the same as if he actually possessed it, whereas, the servant has the right to assume that all necessary examinations have been made by the master, and is not required, either in person, or by another employed by him for the purpose, to examine the machinery as to its fitness and sufficiency. See also *Ryan v. Fowler*, 24 N. Y. 410; *Murphy v. Pollock*, 15 Irish C. L. R. 224. In support of the doctrine announced by the court in 29 Conn., *supra*, the following English cases were cited viz: *Williams v. Clough*, 3 H. & N. 258; *Griffiths v.*

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Gidlow, 3 Hurl. & Nor. 648; *Dyner v. Leach*, 40 Eng. L. & E. 491. We do not think that the last two support the doctrine, and while the report of the other is very meager as to the facts, enough appears to show that the ladder which occasioned plaintiff's injury had been used by him sometime in the master's business, and he had ample opportunity to discover its defects. But, however the rule may be in England and Connecticut and elsewhere, we think we have stated that of this court on the subject under consideration. Tested by the foregoing principles the instructions for plaintiff in this case were unexceptionable

The third, it is said, ignores the question of plaintiff's knowledge of the defect in the road which occasioned his injury. There was no evidence that he was aware of it. He testified that he was not, and no one testified to having ever seen him in a position to observe it before the accident. It was a hidden defect, not observable from the sidewalk, which was as near as plaintiff was shown to have been to that place in the road before he was hurt. The sixth is a full and fair statement of the facts, which if found, entitled plaintiff to a verdict. The ninth of defendant's refused instructions related to the defects in the road, which were not the proximate cause of the injury. The tenth was properly refused because there was no evidence to support it, as to the specific defect which occasioned the injury, and with regard to the other obstructions and defects, they were not the proximate cause of the injury. The eleventh asserted that if plaintiff was informed by the person who employed him to work on defendant's yard, that it was very dangerous, and plaintiff was injured on one of the tracks in the yard, he could not recover. The warning did not call plaintiff's attention to any specific danger, and amounted to no more than a general warning of what every one at all acquainted with the business knows. The substance of the twelfth was embraced in the 3rd, 4th, 5th, 6th and 7th given for defendant.

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The seventh for plaintiff authorized the jury to assess such damages as they should believe from the evidence plaintiff had sustained, taking into consideration the pain and anguish, mental and physical, the loss of his leg and other injuries sustained, not to exceed \$20,000. He was nineteen years old when the accident occurred. He first sued by his next friend, but on attaining his majority, filed an amended petition in his own name, and the counsel for defendant contends, that under this instruction the jury was authorized to compensate him for the loss of two years time, for which his father, if any one, had the right to recover. There was no evidence as to the value of his services for those two years. It is stated in the brief that there was proof that he received \$45 per month, but we find no such, nor any evidence on that question in the abstract, nor any evidence whatever upon which the jury could have allowed any compensation for the loss of that time. Defendant contends that the instruction is so vague as to have authorized the jury to assess the damages as their caprice, prejudice or passion might have prompted. It would be difficult, if not impossible, to frame an instruction in such a case which would determine exactly the amount of damages the plaintiff should recover. For instance, what language would inform the jury exactly how to estimate, in money, the plaintiff's pain and anguish? And this they had a right to consider in making their verdict.

It is contended by the counsel for defendant that "mental pain and anguish are not proper elements of the damages," no wantonness or malice being charged, citing Greenleaf Ev., 267; *Flemington v. Smith*, 2 Car. & Payne 292; *Blake v. Midland Ry. Co.*, 10 E. L. & Eq. 437. Professor Greenleaf so states the law and refers to the above cases, and that of *Cumming v. Inhabitants of Williamsburg*, 1 Cush. 451. These cases do not sustain the learned author. *Flemington v. Smith* was an action by a father for an injury to his son, and the court held that the damages should be such a sum

3. DAMAGES, MENTAL PAIN AND ANGUISH ELEMENTS OF.

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as would compensate plaintiff for his loss in being deprived of the assistance of his son, and the expenses he was put to by his being out of his place, also some small compensation for his mother going to visit him, as she did, but not for injury to parental feelings. This does not sustain the doctrine, that in a suit by the party directly injured (the son), he shall not recover for his mental suffering. *Blake v. Midland Ry. Co.*, 10 Eng. L. & Eq. 437, was an action by a widow under chapter 93 of 9 and 10 Vic. for the death of her husband, which was caused by the negligence of defendant. Coleridge, J., held that no damages should be allowed for the mental suffering of the plaintiff, observing that "the Legislature would not have thrown upon the jury such great difficulty in calculating the *solatium* to the different members of the family without some rule for their guidance. *When an action is brought by an individual for a personal wrong, the jury in assessing the damages can, with little difficulty, award him a solatium for his mental suffering along with an indemnity for his pecuniary loss.*" We have italicized that portion of the above quotation which shows that the learned judge clearly distinguished between such an action, under special statutes, and one by the party himself, who is directly injured. His whole opinion, as will be seen by a careful perusal, is based upon the difficulty indicated in the first paragraph of the above quotation.

By a statute of Massachusetts it was provided that, if any person should receive any injury in his person, by reason of any defect or want of repair in a road, he might recover of the party obliged by law to repair the road, the amount of damages sustained by such injury. *Cumming v. Inhabitants of Williamsburg*, 1 Cush. 451, was an action by plaintiff under that statute, and the court, Metcalf, J., distinctly held that, "though that bodily injury may have been very small, yet if it was a ground of action within the statute, and caused mental suffering to the plaintiff, that suffering was a part of the injury for which he was entitled to damages." *Fay v. Parker*, 53 N. H. 359, cited by defend-

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ant's counsel, has not a word on the subject, but is in regard to exemplary or vindictive damages.

In actions under statutes giving a right of action to husband, or wife, or parents, brothers and sisters, for the death of a husband, or wife, or parent, or son, or brother, or sister, it seems well settled that the damages provided for and recoverable under them are only such as are pecuniary and actual, or fixed in amount by the statutes, and not exemplary and not on account of the mental suffering of the deceased or for the sorrow, grief or suffering of the surviving relatives who may be entitled to recover. Field on Damages, 498. Instructions substantially the same as the one under consideration have been expressly approved by this court. *Whalen v. St. L., K. C. & N. Ry. Co.*, 60 Mo. 323. The authorities cited by Professor Greenleaf do not support him, but clearly recognize the law as heretofore declared by this court, and, therefore, with the highest regard for the distinguished author, whose opinion on any legal question is an authority of great weight, we cannot, in this instance, adopt the rule to which he has given the sanction of his name. In fact, we are inclined to believe from the utter contradiction it meets in the authority relied upon by him that the statement of the law, as it appears in his work, is the result of a typographical error. The circuit court, if the verdict is manifestly prompted by passion and prejudice, or the damages are palpably excessive, may and should set aside the verdict.

There have been three trials of this cause, and three verdicts for plaintiff, the first for \$10,000, the second \$12,000, and the third for \$10,000, and we could, with no propriety say, under these circumstances, that the damages are excessive. The judgment is affirmed.

4. DAMAGES, NOT
EXCESSIVE.

Gamache v. Prevost.

GAMACHE, *Appellant*, v. PREVOST.

1. **Infancy: PRACTICE.** A minor can appear to an action only by guardian or next friend, not by attorney.
2. ———: ———: **REFEREE.** An action to which a minor is a party cannot be referred to a referee.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

E. T. Farish for appellant.

Marshall & Barclay for respondent.

PER CURIAM.—This suit was instituted in the St. Louis circuit court by plaintiff, to establish, in solemn form, the will of Wm. M. Prevost, who died in 1870. Emelia was a minor. No guardian, *ad litem*, was appointed for her. Answer was filed by Lackland, Martin & Lackland for all of the defendants. It was filed for defendants by their attorneys. The case was, by consent of parties, February 17th, 1874, referred to Judge Reber, who made a report which was favorable to the plaintiff, on the issues made by the pleadings, and at the June term, 1874, the record shows the appearance of the parties, Emelia by her guardian and the others by their attorneys, and exceptions to the report of Judge Reber overruled, and the report establishing the will confirmed, and judgment accordingly. After various motions, which it is unnecessary to notice, the cause was appealed to the court of appeals where the judgment was reversed, and from that judgment plaintiff has appealed to this court. The errors assigned were, that the judgment was rendered without the appointment of a guardian *ad litem*, or next friend for the minor; that the suit was not defended by any one on behalf of the minor; that it was irregular to refer the case to a referee, Emelia being a minor and incapable of consenting to a reference. This court agrees with the court of appeals, that these

The City of Jefferson v. Curry.

points were all well taken. The opinion of the court of appeals satisfactorily disposes of the questions raised, and its judgment is affirmed. All concur.

THE CITY OF JEFFERSON, *Plaintiff in Error*, v. CURRY.

1. **Execution.** A sale under an execution which was not levied until after the return day is void.
2. ———. The City of Jefferson has power under her charter, (Acts 1872, p. 390, § 1,) to buy in land sold at execution sale for taxes due the city.

Error to Cole Circuit Court.—HON. G. W. MILLER, Judge.

AFFIRMED.

At the January term, 1878, of the Cole circuit court, a special judgment was rendered in favor of the City of Jefferson and against the defendant, Curry, for certain taxes due on two lots of ground. The taxes were adjudged to be a lien on the lots. On the 11th day of March, 1878, a special execution was issued, made returnable to the next May term of court. This execution was not delivered to the sheriff until the 23rd day of the following November. On the same day he levied upon the lots, and on the 23rd of the following month sold them at public sale to the city. Defendant then filed a motion to quash the execution and to vacate and set aside the sale, which motion was sustained, and the city sued out this writ of error.

J. R. Edwards for plaintiff in error.

Ewing, Pope & Hough for defendant in error.

NAPTON, J.—The only point necessary to be determined in this case is whether a sale of two lots under an execution issued on the 11th day of March, 1878, returnable to the May term of the same year, which was never

The State *ex rel.* Liggett v. Osborn.

delivered to the sheriff, until November 23rd, 1878, and of course never levied until after the expiration of the return day, was properly quashed by the circuit court.

The lots were purchased by the city under this execution upon a judgment creating a special lien on them for the taxes due. One of the grounds for quashing the execution and declaring the purchase and deed void, was that the city had no power to purchase, but this was ruled otherwise in *Chambers v. City of St. Louis*, 29 Mo. 576, and *McIndoe v. City of St. Louis*, 10 Mo. 576; and the case of *Ray County to use of, &c., v. Bentley*, 49 Mo. 236, does not conflict with these decisions. Indeed in the first named case it was observed by Judge Scott: "Whether these lands are necessary for the corporation is a question that can only arise in a proceeding instituted by the State against the city for abusing her right to purchase lands. The city had a power to purchase; if that power has been exceeded, then her charter has been violated and may be forfeited in a suitable proceeding, and until that is done, she will hold the land."

As the execution was a nullity in this case, never having been levied until after the return day, the court properly quashed the proceedings under it, and the judgment must be affirmed. The other judges concur.

THE STATE *ex rel.* LIGGETT V. OSBORN. *Appellant.*

Principal and Ancillary Administration: LIABILITY OF ADMINISTRATOR. Where the same person conducts the principal administration of an estate in another State, and ancillary administration here, he will not be liable upon his ancillary bond for the proceeds of land sold in the other State, though the money is brought into this State.

Appeal from Gentry Circuit Court.—HON. S. A. RICHARDSON,
Judge.

REVERSED.

Lewis, Hubbard & Pike for appellant.

Lay & Belch with *C. H. S. Goodman* for respondent.

HENRY, J.—Caswell Osborn died in Kentucky in 1862, and by his last will and testament appointed his son, Josiah, then a minor, his executor. The will was admitted to probate in Pulaski county, Kentucky, and Gilbert Osborn, the defendant, was, by the proper tribunal of said county, appointed administrator with the will annexed of Caswell's estate. By the will of said Caswell Osborn, his executor was empowered to sell certain lands in what is known as "the Flat Woods section," in that part of Kentucky. Caswell Osborn's family and said Gilbert, in 1864, moved from Kentucky to Gentry county, in this State, where Gilbert again took out letters of administration on Caswell's estate, and his co-defendants are his securities on his administration bond. After he thus administered in this State, he sold 255 acres of the land in Kentucky, mentioned in the will, for about \$300, and the object of this suit is to hold him and his securities here liable for an alleged failure on his part properly to account for said money as administrator in this State.

The administration in Kentucky was the principal, and that in this state the ancillary administration. The intestate never resided in Missouri. The real estate, and the proceeds of the sale thereof, belonged to the administration in Kentucky. If the proceeds of the sale of the land, were brought to this State by the administrator duly qualified in Kentucky, and squandered, or misappropriated, he and the securities on his bond in that State are liable to the creditors and distributees of the estate. "The an-

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cillary administration cannot be allowed to draw into its jurisdiction any assets not locally situated within its limits." (Redfield on Wills, 5 Vol. 28.) Here the sale of the lands in Kentucky was made under the will, and the purchase money received by the administrator, equally with the land, appertained to the administration in the State of Kentucky. That the Kentucky administrator had the money for which the land was sold, in this State, did not withdraw it from the principal administration. The decisions of other States are not in accord on the subject, but we think that the weight of authority supports the views above expressed. *Spraddling v. Pipkin*, 15 Mo. 118; Story's Conflict of Laws, § 514; *Fay v. Haven*, 3 Met. 109; Redfield on Wills, 3 Vol. 28. The judgment of the circuit court, which was for plaintiffs, is reversed, and the cause dismissed. All concur.

THE STATE V. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN
RAILWAY COMPANY, *Appellant*.

Taxes: PENALTIES AND ATTORNEY'S FEE. The taxes sued for in this case having been levied in violation of the statute as interpreted by this court in the case of the *State ex rel. Pettis Co. v. Union Trust Co.*, 68 Mo. 463, it was error in the court below after they had been paid notwithstanding their illegality, to give judgment against the defendant for penalties and an attorney's fee.

Appeal from Stoddard Circuit Court.—HON. R. P. OWEN,
Judge.

REVERSED.

Thoroughman & Warren and W. R. Donaldson for appellant.

J. I. Smith, Attorney-General, for the State.

HOUGH, J.—This suit was instituted on the 20th day

The State v. Miller.

of August, 1875, to recover certain State, county and school taxes assessed against the defendant for the year 1874, together with the penalty prescribed by law for failing to pay the same when due, and an attorney's fee of five per cent for prosecuting the suit. It was admitted at the trial that the taxes due the State were paid after the suit was instituted; and it was shown by the defendant that the county and school taxes were paid in twelve monthly installments, ending August 1st, 1876, with six per cent interest, but without penalty and without attorney's fee. On the 22nd day of August, 1876, judgment was rendered against the defendant for \$702.32. It is conceded by the Attorney-General that the taxes levied by the county court, and sued for in this action, were erroneously levied at the rate fixed for the year 1874, instead of the rate fixed for the year 1875, as was required by the 21st section of the Act of March 15th, 1875. For this error the judgment must be reversed. *The State ex rel. Pettis Co. v. Union Trust Co.*, 68 Mo. 463. Besides, there can be no penalty for a failure to pay taxes which have been illegally levied. Judgment reversed and cause remanded. All concur.

THE STATE V. MILLER, *Appellant*.

1. **Venue.** The conviction in this case is set aside because there is no evidence in the record to show that the offense was committed within the jurisdiction of the trial court.
2. **Impeachment of Witness: PRACTICE.** When a witness is called to impeach another by proof of general character, a liberal cross-examination touching his means of knowledge should be allowed.

Appeal from Clay Circuit Court.—HON. GEO. W. DUNN,
Judge.

REVERSED.

Tichnor & Warner and W. M. Burris for appellant.

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cillary administration cannot be allowed to draw into its jurisdiction any assets not locally situated within its limits." (Redfield on Wills, 5 Vol. 28.) Here the sale of the lands in Kentucky was made under the will, and the purchase money received by the administrator, equally with the land, appertained to the administration in the State of Kentucky. That the Kentucky administrator had the money for which the land was sold, in this State, did not withdraw it from the principal administration. The decisions of other States are not in accord on the subject, but we think that the weight of authority supports the views above expressed. *Spraddling v. Pipkin*, 15 Mo. 118; *Story's Conflict of Laws*, § 514; *Fay v. Haven*, 3 Met. 109; *Redfield on Wills*, 3 Vol. 28. The judgment of the circuit court, which was for plaintiffs, is reversed, and the cause dismissed. All concur.

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Appeal from Stoddard Circuit Court.—HON. R. P. OWEN,
Judge.

REVERSED.

Thoroughman & Warren and W. R. Donaldson for appellant.

J. L. Smith, Attorney-General, for the State.

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The State v. Miller.

of August, 1875, to recover certain State, county and school taxes assessed against the defendant for the year 1874, together with the penalty prescribed by law for failing to pay the same when due, and an attorney's fee of five per cent for prosecuting the suit. It was admitted at the trial that the taxes due the State were paid after the suit was instituted; and it was shown by the defendant that the county and school taxes were paid in twelve monthly installments, ending August 1st, 1876, with six per cent interest, but without penalty and without attorney's fee. On the 22nd day of August, 1876, judgment was rendered against the defendant for \$702.32. It is conceded by the Attorney-General that the taxes levied by the county court, and sued for in this action, were erroneously levied at the rate fixed for the year 1874, instead of the rate fixed for the year 1875, as was required by the 21st section of the Act of March 15th, 1875. For this error the judgment must be reversed. *The State ex rel. Pettis Co. v. Union Trust Co.*, 68 Mo. 463. Besides, there can be no penalty for a failure to pay taxes which have been illegally levied. Judgment reversed and cause remanded. All concur.

THE STATE V. MILLER, *Appellant*.

1. **Venue.** The conviction in this case is set aside because there is no evidence in the record to show that the offense was committed within the jurisdiction of the trial court.
2. **Impeachment of Witness:** PRACTICE. When a witness is called to impeach another by proof of general character, a liberal cross-examination touching his means of knowledge should be allowed.

Appeal from Clay Circuit Court.—HON. GEO. W. DUNN,
Judge.

REVERSED.

Tichnor & Warner and W. M. Burris for appellant.

J. L. Smith, Attorney-General, for the State.

NORTON, J.—The defendant was indicted at the May term, 1875, of the criminal court of Jackson county, in Kansas City. The indictment contained two counts, in the first of which defendant was charged with grand larceny, and in the second with receiving stolen goods. The cause was tried at the August term, 1878, of the Clay county circuit court, to which it had been transferred by change of venue, and defendant was found not guilty as to the first, and guilty as to the second count, and his punishment assessed at two years imprisonment in the penitentiary. The cause is here by appeal.

While the evidence tends to show that the goods which the defendant is charged with having stolen, and
 1. VENUE. with having received, knowing them to be stolen, were taken from the barn of one Everhart, in Kansas City, who was the owner of them, there is a total failure of evidence either showing or tending to show that the goods were received by defendant either in Kansas City or Jackson county. And as there was no evidence tending to show that the offense charged in the second count of the indictment was committed within the jurisdiction of the court, the judgment rendered upon the verdict of the jury must be reversed. Whether this omission occurred from inadvertence in making up the bill of exceptions or the failure of the State to make the proof on the trial, is immaterial. While the evidence tends to show that a part of the stolen goods were found at the "place of business" of defendant, it entirely fails to show where that place of business was. *State v. Meyer*, 64 Mo. 190; *Gordon v. State*, 4 Mo. 375.

This view of the case renders it unnecessary to discuss the other numerous exceptions to the action of the trial
 2. IMPEACHMENT OF WITNESS: practice. court, though it may be proper to observe that when a witness is called to impeach another by proof of general character, a liberal cross-exami-

The Singer Manufacturing Company v. Hester.

nation touching his means of knowledge should be allowed, and authorities of the highest respectability go to the extent of saying that on such cross-examination it is permissible to inquire of the witness the name of the person whom he has heard speak against the reputation of the witness sought to be impeached, as it may turn out that all the persons from whom he has heard unfavorable reports are personal enemies and sustain such relations to the witness or party whose character is the subject of assailement that but little if any importance should be attached to what they may have said. 1 Greenleaf Ev., § 461; *Weeks v. Hall*, 19 Conn. 376; *Annis v. People*, 13 Mich. 511. Judgment reversed and cause remanded, in which all concur.

THE SINGER MANUFACTURING COMPANY, *Appellant*, v. HESTER.

Guaranty: NOTICE: PROMISSORY NOTE. A guarantor of a promissory note is not entitled to notice before suit of demand upon the maker and refusal by him to pay.

Appeal from Holt Circuit Court—HON. H. S. KELLEY,
Judge.

REVERSED.

T. H. Parish for appellant.

NAPTON, J.—The question in this case is identically the same which was decided by this court in *Barker v. Scudder*, 56 Mo. 276, and was reiterated in *Davis Sewing Machine Co. v. Jones*, 61 Mo. 409. The suit in this case was upon a guaranty of a note for a sewing machine given by the purchaser, Durham, on the back of which was written "For a valuable consideration I hereby guaranty the payment of the within note." Signed: "Joel Hester." The defense was that "no notice at any time was

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given by plaintiff to defendant, of any demand of payment or refusal to pay, on the part of said Durham, of said note." There was a motion to strike out this part of defendant's answer, which was overruled, and judgment was given for defendant on the pleadings. This question was strictly passed on in the case of *Barker v. Scudder*, and according to that, this judgment must be reversed and the cause remanded. The other judges concur.

THE CITY OF ST. LOUIS V. WOODRUFF, *Appellant*.

Municipal Corporation: VEHICLE LICENSE: STREET SPRINKLING CARTS ARE "PUBLIC VEHICLES." A city ordinance imposed a license tax on all "public vehicles using the streets of the city for trade or traffic or other purposes." One A was engaged in the business of sprinkling the streets with water, for compensation paid by the owners of property fronting on the streets, and for this purpose used tanks which were mounted on wheels and driven through the streets, and were known as sprinkling carts. *Held*, that these carts were "public vehicles" within the meaning of the ordinance, and as such were subject to the tax.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Edmund T. Allen for appellant.

Leverett Bell for respondent.

HENRY, J.—The defendant was convicted and fined \$10 in the St. Louis police court for pursuing his avocation as driver of a street-sprinkling cart, without having a license, which was required by the city ordinance. He appealed to the court of criminal correction, and again there was judgment for the city, from which he appealed to the St. Louis court of appeals, and from the judgment in that court, affirming that of the court of criminal correction, defendant has appealed to this court.

An ordinance of the city, No. 9780, provides that: "There shall be annually levied and collected a license tax upon all public vehicles using the streets of the city for trade or traffic or for any other purpose, etc." The ordinance classifies the vehicles and fixes the tax on each class, and then adds: "On each two horse wagon, not before mentioned, ten dollars." Sprinkling wagons, not being included in either of the classes previously named, belong to the latter general classification, if taxable at all. The power of the city to impose the tax cannot be seriously controverted. By her charter when this ordinance was passed, power was expressly given to the mayor and city council, by ordinance, "to license, tax and regulate street railroad cars, hackney-carriages, omnibuses, carts, drays and other vehicles." The language is almost comprehensive enough to embrace wheel-barrows.

The facts agreed upon are, that defendant was in the employment of Schuerman Bros. & Co., a firm residing and doing business in St. Louis city, and engaged in the business of street-sprinkling. That business consisted in contracting with owners and tenants of city real estate, to sprinkle the streets during certain months in the year, in front of the property owned or occupied by their employers. For the purpose of doing said work, they used tanks upon wheels, known as sprinkling carts, and defendant was operating one of these tanks at the time of his arrest, for sprinkling the streets of the city, and had been doing so for more than ten days before his arrest. No license had been taken out.

Was the sprinkling cart a public vehicle which was used by defendant for trade or traffic? It was not owned by the public, nor are the vehicles of any class named in the ordinance so owned. They are all private property used in public employments, and this is what is meant in the ordinance by "public vehicles, using the streets of the city for trade or traffic, etc." The sprinkling cart was not used exclusively for the purpose of hauling and sprinkling water

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upon the street in front of the premises of its owner, but to haul and sprinkle water on the streets for other persons who would employ and pay them for it, and was as much a public vehicle, as omnibuses and hackney-carriages used in the city in the business of transporting persons for pay. The one is equally with the other, a public business. The judgment of the court of appeals is affirmed. All concur.

DAVIS V. GIVENS, *Appellant*.

Joint Purchase: POSSESSION OF ONE PURCHASER INURES TO BENEFIT OF BOTH. Two persons purchased jointly at a sale under a deed of trust and afterward one of the two, the other refusing to join, in order to induce the grantor in the deed of trust to vacate, paid her money and received exclusive possession. *Held*, that the possession so obtained inured to the benefit of both, and this regardless of whether the trust sale conferred any title or right to the possession or not.

Appeal from Daviess Circuit Court.—HON. S. A. RICHARDSON,
Judge.

AFFIRMED.

Defendant gave evidence tending to show that his purchase of the possession from the widow Harman was made for the benefit of himself alone.

Hicklin & Saylor for appellant, argued that no title passed by the trustee's deed, and that appellant had acquired the exclusive right to the possession by this purchase from the widow Harman.

Chas. A. Winslow for respondent, argued that Givens and Venable were joint purchasers under the deed executed by the sheriff as trustee, and the presumption is that the possession was taken under the deed. Givens had no

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right to buy the possession for himself and set it up to defeat the common title, ~~any~~ more than he could buy in an outstanding title and use it to defeat the common title. It was immaterial what title was conveyed by the deed. Such as it was they were mutually bound by it, and the possession taken under it must inure to both. Either might enter and occupy the whole, and one was not bound to enter at the request of the other, but neither had the right to enter and oust the other. *Jones v. Stanton*, 11 Mo. 433; *Picot v. Page*, 26 Mo. 398; *Warfield v. Lindell*, 30 Mo. 272; s. c., 38 Mo. 561; *Forder v. Davis*, 38 Mo. 107; *Lapeyre v. Paul*, 47 Mo. 586.

HOUGH, J.—This was an action of ejectment. The plaintiff recovered judgment, and the defendant has appealed.

In 1857 Jeremiah Harman died, seized of the land in controversy, leaving a will, the first clause of which is as follows: "I will and bequeath to my beloved wife, Elizabeth Harman, the farm on which I now reside, being one hundred and twenty acres of land, and all my personal property, cattle, horses, hogs and every other species of personal property, as long as she shall remain my widow, for the purpose of raising my family of children, and at her death or marriage, I desire that the remainder of my estate, real and personal, be equally divided among my children, to-wit: Jacob, Martha, John, Jasper, Andrew, Nathan, Valentine, Peter, Mary J., Jeremiah and Elizabeth Harman." The second clause directs a horse, saddle and bridle to be given to each of the minor children, at their majority, to equalize them with those already of age. The third clause directs the disposition of personal property to pay debts if needed. These are all the provisions of the will. On May 11th, 1869, Andrew J. Harman, Peter Harman and Mary J. Johnson, children of Jeremiah Harman, deceased, conveyed their interest in the land in controversy to their brother, Valentine Harman; and on the same day

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Valentine Harman and Elizabeth Harman, the widow of Jeremiah Harman, executed a deed of trust conveying the land sued for, to secure the payment of two promissory notes given by the grantors in said deed, to one Albert Venable. At a sale under said trust deed, Albert Venable and William Givens purchased the land conveyed, and received a deed therefor. There was testimony tending to show that Mrs. Harman refused to surrender possession to Venable and Givens, and that an action of ejectment was brought against her by them, which action was compromised by the payment to her of \$50 by Givens for the possession of the land for himself and Venable. Venable did not furnish any portion of the \$50 paid by Givens, and declined to do so, for the reason that he had paid the entire purchase money at the trustee's sale, amounting to \$500, as well as the fees for the execution of the trustee's deed. On January 9th, 1873, Venable conveyed to plaintiff his undivided interest in the land in controversy. The ouster of the plaintiff was admitted, so that the only question is as to his right.

It is unnecessary to determine the extent of the power conferred upon Mrs. Harman, by the terms of the will, over the property devised to her. Whatever right was acquired by Givens and Venable under the trust deed, was held and owned by them as tenants in common; and there was testimony tending to show that the actual possession was acquired by them in the same way. So that it is immaterial for the purposes of the present action, whether Venable and Givens acquired the present right of possession by their purchase at the trustee's sale, or by their subsequent purchase from Mrs. Harman. In either event Venable was entitled to share the possession, and the plaintiff has succeeded to his rights. The judgment must therefore be affirmed. All the judges concur.

Dameron v. Jameson.

DAMERON v. JAMESON, *Appellant.*

1. **Partition: PARTIES.** Where it appears from the facts in evidence in a suit for partition that a person who is not a party to the record has an interest in the land, no partition should be ordered until he is made a party.
2. **Partition, when Defendant is in Adverse Possession.** The doctrine that partition will not lie when the defendant is in adverse possession of the premises, does not apply when the plaintiff's title is an equitable one only.
3. **Parties to Suit in Equity.** One who has executed two deeds to different persons, both purporting to convey the whole title to the same land, is not a necessary party defendant to an equitable proceeding brought by one of his grantees against the other to adjust their conflicting claims.

Appeal from St. Louis Court of Appeals.

REVERSED.

Norton & Martin for appellant.

McKee & McFarland for respondent.

HENRY, J.—The petition states that Ephraim Page died, leaving as his only heirs at law, three children, F. W. Page, Helen Page and Rosina A. Strange; that prior to his death, which occurred on the 11th day of May, 1859, Ephraim, without the knowledge or consent of his son, F. W. Page, conveyed to him by deed, the land in controversy; that in October, 1873, F. W. Page, ignorant of the existence of the deed, and supposing that he owned but one third of the land and his two sisters each a third, contracted and sold to defendant one-third of said land; that after the making of this contract and before F. W. executed a deed, defendant first learned from an examination of the record of the existence of the deed of Ephraim Page to F. W. Page and had a deed prepared to himself, to be executed by F. W. who, still ignorant of the deed of his father, executed the deed so prepared by the defendant

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conveying the whole tract to defendant who now claims to be the exclusive owner; that, without any notice of the claim made by defendant, plaintiff purchased the interest of F. W. Page's two sisters in the land, and asks for a decree correcting the deed from F. W. to defendant and for judgment of partition.

A demurrer to the petition was overruled; and defendant's answer admits the execution of the deed from Ephraim to F. W.; denies that it was without the knowledge and consent of the latter; denies that on the 1st day of October, 1873, F. W. was ignorant of the existence of that deed, or believed he owned but one-third interest therein, and avers that F. W. made the conveyance to defendant, knowing that he owned the whole tract; admits that he discovered by the record that F. W. had a perfect title, and avers that defendant purchased in good faith; denies fraud; denies that plaintiff purchased the interest of the two sisters in good faith; denies that the sisters ever had any interest in the land, and alleges that plaintiffs knew, when they purchased, that defendant had the title to the entire tract; alleges that defendant owned the legal and equitable interest of the sisters by virtue of an agreement with them before plaintiffs purchased their interest. It further sets up a title under a tax deed of Elsberry & Bro., dated October 17th, 1869, also by deed from J. B. Allen and wife October 15th, 1873. Replication denies the averments in the answer.

At the spring term of the court, 1876, after hearing the evidence, the court, on plaintiff's motion, permitted them to amend their petition, so as to correspond with the proof, by inserting the following: "They further say that they have purchased also, and hold deed for the legal title to said land from F. W. Page." To this action of the court defendant objected and excepted. He also filed a motion to require plaintiff to elect under which source of title they would claim, whether that from the sisters or that from F. W. Page. This was overruled, and defendant ex-

cepted. There was a finding and judgment as prayed for, from which defendant appealed to the St. Louis court of appeals, by which it was affirmed, and he has appealed to this court from that judgment.

The allegation of fraud on the part of defendant in procuring the deed from F. W. Page for the whole tract, is fully sustained by the testimony of Page, Dameron and Gibson, the justice of the peace who took the acknowledgment of the deed from F. W. to defendant, and we have, therefore, only to consider the questions of law presented by the record.

The deed from his father, duly recorded, purported to convey to F. W. Page the whole tract, but defendant acquired only one-third interest, that being what he contracted for, the deed for the entire interest having been by him procured by fraud. F. W. Page never accepted the deed for the whole tract, but always recognized the interest of his sisters, both before and after he learned that his father had conveyed the entire tract to him. By his deed to plaintiffs, he conveyed nothing, having previously, by his deed to defendant, conveyed all the interest he claimed in the premises, and the plaintiffs, when they procured their deed from him, were aware that he had and claimed no interest in the land, except a third, which had been conveyed to defendant. The deed from Rosina A. Strange and Ellen Page to the plaintiffs conveyed only the interest of Ellen, Rosina then being a married woman, and her husband not joining in the deed; and as hers was not a separate estate in the land, her deed passed no title, legal or equitable. *Shroyer v. Nickell*, 55 Mo. 264. Therefore, the defendant is the owner of an undivided one-third, the plaintiffs a third, and Rosina a third. Rosina is not a party to this suit, and as her interest appears on the face of the record, there can be no partition until she is made a party.

It is urged by defendant that partition will not lie when defendant is in adverse possession of the premises,

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2. PARTITION, WHEN
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IN ADVERSE POS-
SESSION.

of which partition is asked. This doctrine, in cases to which it is applicable, is well settled, but no case can be found in our reports where the principle was applied in a proceeding to establish an equitable title, and also for partition. When the plaintiff asks for partition, and the defendant is in the adverse possession of the property, the courts refuse to partition the land between them, until plaintiff establishes his title, and a suit in ejectment is the proper proceeding for that purpose; but where, as here, the plaintiff has an equitable title, and asks the aid of the court of equity to establish it, if the court ascertain that he has an interest, and what that interest is, the doctrine that partition cannot be had when the defendant is in the adverse possession of the premises, does not apply. The decree establishes plaintiff's title, and under it the court may put him in possession, and a suit in ejectment becomes necessary. The court, having acquired jurisdiction of the cause, may proceed to determine the whole controversy by decreeing a partition of the premises. *Rozier v. Griffith*, 31 Mo. 171.

While F. W. Page's deed to the plaintiffs conveyed to them no interest in the land, it divests him of all interest in this controversy in favor of plaintiffs, and he was not a necessary party to the suit. He had conveyed all the interest he had in the land to the defendant. He had never accepted, but on the contrary, expressly refused to accept, the conveyance from his father and had no title to the land, except by inheritance jointly with his two sisters.

Except as herein otherwise indicated, we think that the opinion of the court of appeals, delivered in this case, correctly declares the law on the questions presented by the record. Inasmuch as Rosina A. Strange, who owns one-third of the land in controversy, is not a party to the suit, the judgment is reversed and the cause remanded. All concur.

3. PARTIES TO SUIT
IN EQUITY.

Mauerman v. Siemerts.

MAUERMAN V. SIEMERTS *et al.*, Appellants.

1. **Negligence, when a Question of Law, when of Fact.** The question of negligence depends upon and must be determined by the circumstances of each case. The court may decide it as matter of law, when the facts are undisputed; but when the facts are disputed, or when they are undisputed but admit of different constructions and inferences, the question may properly be referred to the jury.

Case adjudged. In an action for the negligent wounding of plaintiff, a girl about eleven years old, it appeared that as she was passing along the sidewalk in front of a house which defendants were in the act of tearing down, a brick fell from the house and struck her on the head, inflicting the injuries complained of. The evidence also showed that defendants had placed a barrier across the sidewalk, at the end of the house which plaintiff, at the time of the accident, was approaching, which consisted of a plank fastened to the house and sloping downward to the curbstone or outer edge of the pavement, where it was nailed to a tree; that the space between the plank and pavement next to the house was from three to five feet, sufficient to allow grown persons to pass under without difficulty, by stooping slightly, and that it offered no obstacle to the passage of children of plaintiff's age. It was also shown by one witness that on the morning of the accident he was so impressed with the insufficiency of the guard that he called to defendants' workmen to put up additional guards, and warned his own children and others of the danger of using the sidewalk. It appeared on the other hand that plaintiff passed around the barrier by walking in the gutter, and then stepped back upon the sidewalk, when she was hurt; *Held*, that the trial court properly left it to the jury to say whether the accident was the result of defendants' negligence in failing to provide a sufficient barrier, or of plaintiff's negligence in disregarding the one provided.

2. **Instruction.** While it is error to give an instruction which assumes as a fact a matter in issue, the giving of such an instruction will not warrant a reversal of the cause, when the evidence is clear and conclusive as to the fact and there is no contradictory evidence.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Lay & Belch and A. M. Hough for appellants.

Respondent not represented.

NORTON, J.—A reversal of the judgment in this case is sought because of alleged errors committed by the court in refusing to give an instruction asked by defendant that under the evidence plaintiff was not entitled to recover, and because the court gave improper and refused to give proper instructions.

The suit was instituted to recover damages for injuries sustained by plaintiff, and alleged to have been occasioned by the negligence of defendants while engaged in taking down a portion of a certain building known as the Sister's Hospital, and situated on the southeast corner of Fourth and Spruce streets in the city of St. Louis. The petition substantially avers that the negligence of defendants consisted in leaving the sidewalk in front of said building insufficiently guarded, and that plaintiff, a girl about eleven years old, in going to school and in passing along said sidewalk, without fault of her own, and without warning of impending danger was stricken to the earth by a brick falling on top of her head, which was precipitated from the upper portion of said building by defendants or their agents; that by reason thereof plaintiff's skull was fractured and she was permanently and for life crippled in body and mind, and disqualified from discharging duties incumbent upon her, and from earning a livelihood; that she had been damaged in the sum of \$5,000. The answer is a specific denial of the matters alleged in the petition, and avers that the sidewalk was sufficiently guarded, and that if plaintiff was injured it was occasioned by her own negligence and not by fault of defendant. On the trial in the circuit court plaintiff had judgment for the sum of \$3,000, from which defendants appealed to the St. Louis court of appeals, where the judgment was affirmed, from which defendants have again appealed to this court.

It is not disputed but that the evidence adduced on the trial clearly shows that the plaintiff was injured by a

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I. NEGLIGENCE,
WHEN A QUESTION
OF LAW, WHEN OF
FACT.

brick precipitated from the top of the said building while the workmen of defendants were engaged in tearing it down, whether accidentally or otherwise does not appear, nor is it disputed, but that the injuries received by plaintiff were of the serious character alleged in the petition. The principal question brought to our attention for determination is as to the propriety of the action of the trial court in refusing to instruct the jury that under the evidence plaintiff could not recover, and whether the injury was occasioned because of the negligence of plaintiff in going on the sidewalk, or the negligence of defendants in not having sufficiently guarded the premises so as to give warning to those who might have occasion to use the sidewalk, especially to persons of the age of plaintiff, that it was dangerous to do so.

There is some conflict in the evidence in regard to the sufficiency of the barriers which were put up across the sidewalk in front of said building, to impart notice of danger in the use of it. The evidence tended to show that the barrier put up across the sidewalk on the end or side of the building, which plaintiff, on the morning of the accident, was approaching, consisted of a plank which was fastened to the window frame of the building and sloped from the building to the curb stone or edge of the pavement, at which place it was nailed to a tree; that the space between the plank and pavement next to the building was from three to five feet, sufficient to allow grown persons to pass under without difficulty by stooping slightly, and that it offered no obstacle to the passage of children of the age of plaintiff. It was shown by one witness that on the morning of the accident he was so impressed with the insufficiency of the guard, that he called to the workmen engaged in tearing down the building to put up additional guards, and warned his own children and others of the danger of using the sidewalk. It would have been improper for the court, with this evidence before it, to have declared as a matter of law, that there was no proof of

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negligence on the part of defendants. The question as to whether the guards put up by defendants were insufficient to prevent plaintiff from freely passing under, or to impart notice to her that there was danger in passing over the sidewalk, were questions of fact for the jury. If sufficient, defendants were not chargeable with negligence; if insufficient, they were, and the court so instructed the jury.

It is, however, insisted that defendant's demurrer to the evidence should have been sustained because it showed that the barriers erected by defendant did, as a matter of fact, warn plaintiff of the danger, and that in disregard of it she went upon the sidewalk, and in doing so was guilty of contributory negligence. It appears from the statement made by plaintiff, who was examined as a witness, that she went around the plank where it was nailed to the tree, and then went on to the pavement, when she received the injury. It does not appear either from her statement or that of any other witness, that she was induced by the barrier to walk into the gutter. That she was so induced is a mere inference which is partly, if not wholly, rebutted by the fact that she could have passed without hindrance under the barrier to the sidewalk, and with less inconvenience than by walking around the tree into the gutter. A child of the age of plaintiff, on approaching the barrier, and seeing that the space between it and the pavement was from three and a half to five feet, as sworn to by the witnesses, would most naturally conclude that it was not erected to prevent children from passing under it to the sidewalk, and their doing so would not be attended with danger. We think the court under this evidence properly refused to declare as a matter of law that the mere fact of plaintiff passing around the tree was contributory negligence on her part, and that the question was properly referred to the jury. The question of negligence depends upon, and, must be determined by the circumstances of each case, and the court may so declare as a matter of law when the facts are undisputed, but when either the facts are disputed, or

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the facts undisputed admit of different constructions and inferences, the question may properly be referred to the jury. *Norton v. Ittner*, 56 Mo. 352; *Wyatt v. Citizens Railway*, 55 Mo. 485.

It is also insisted that instruction number one given on behalf of plaintiff is erroneous, because it assumes as a
2. INSTRUCTION. fact that Fourth street where the accident occurred, was a crowded thoroughfare of the city, which fact was put in issue by the pleadings. That an instruction which assumes a fact put in issue by the pleadings is erroneous, is established by repeated decisions of this court cited by counsel. But it has also been held, that while an instruction, which assumes as true a fact in issue, is wrong, the giving of such an instruction will not warrant a reversal of the cause, when the evidence is clear and conclusive as to such fact, and there is no contradictory evidence. *Caldwell v. Stephens*, 57 Mo. 589; *Barr v. Armstrong*, 56 Mo. 577. All the evidence introduced on the trial in this case tended to show that Fourth street was a crowded thoroughfare of said city, and on this point there was no contradictory evidence, and conceding, as defendants claim, that the instruction is erroneous in the particular complained of, adopting for our guidance the rule as laid down in the cases above noted, we do not feel warranted to reverse the judgment on that account. We think the instructions that were given presented fairly the law applicable to the case and that the judgment was for the right party. Judgment affirmed, with the concurrence of the other judges, except SHERWOOD, C. J., who dissents.

Campbell v. The City of St. Louis.

CAMPBELL V. THE CITY OF ST. LOUIS *et al.*, Appellants.

Power to Contract and Adjust Claims for Public Printing in St. Louis. Under the charter of the city of St. Louis as revised and amended in 1870, (Sess. Acts, p. 485, art. 11, §§ 1, 2, 3, 4, 5,) the comptroller, and not the city council, had power to contract for the public printing. If a controversy arose between the city and the printer as to the amount due for work done under a contract, the council had no power to adjust the dispute.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

The plaintiffs filed a petition in behalf of themselves and all other citizens and taxpayers of the city of St. Louis charging that the city was a municipal corporation, whose corporate powers were defined by its charter; that plaintiffs were resident citizens and taxpayers of the city; that the defendants are respectively the city, its auditor, its comptroller, its treasurer and the Times Company of St. Louis; that by the charter of the city the legislative power is vested in the city council, which has power to levy taxes and appropriate the money when levied according to the exigencies of its charter; that the Times Company is a corporation publishing a newspaper in the city of St. Louis; that about the 27th day of May, 1873, said Times Company, according to the charter of the city, made a contract with said city for doing all the city printing for one year from date, and until its successor should be selected and qualified, at the uniform price of five cents per line nonpareil; that in May, 1874, said Times Company was required by said city to do, and did do, certain printing under said contract amounting according to the contract to the sum of \$1,389.71, which was paid by the city; that the Times Company claimed the additional sum of \$503.61 for said printing, which claim was made on the fraudulent and unjust pretense that said Times Com-

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pany was entitled to charge double price per line nonpareil for certain portions of said printing consisting of what was called rule and figure, or tabular work; that the city council, on the 10th day of July, 1874, adopted a resolution that the "said company be allowed payment in full for printing on their scale of prices for tabular matter," and in February, 1875, passed an ordinance for the relief of the Times Company, ordaining that the city auditor be directed to draw his warrant in their favor for \$503.61, and making an appropriation for such payment, which ordinance was approved by the mayor; that under color of this ordinance the auditor of the city was about to draw his warrant for \$503.61 on the treasurer to be paid by him out of the funds of the city collected by taxation for corporate and municipal purposes thereof, and set apart for printing and stationery, which warrant would be countersigned by the comptroller and paid by the treasurer unless restrained by order of court; that the Times Company had no legal or equitable right to claim this sum of \$503.61, nor had the city council any authority to pass the ordinance or appropriate any money in satisfaction of the claim; that such appropriation would be illegal, unauthorized and a waste of the city's money; and the petition asked for a restraining order. To this petition there was a general demurrer, which was sustained by the court, and the petition was dismissed. On appeal to the court of appeals this judgment was reversed. Defendants then appealed to this court.

Marshall & Barclay for appellants.

Samuel Reber for respondents.

PER CURIAM.—This was a proceeding to enjoin the city of St. Louis from paying and the St. Louis Times Company from receiving \$503.61 on a printing contract between the city and said company, which the latter claimed on the ground that it was entitled to charge double price per line

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nonpareil for certain portions of said printing consisting of rule and figure, or tabular work. The city council, on the 18th day of July, 1874, adopted a resolution that the said company be allowed payment in full for printing on their scale of prices for tabular matter, and in February, 1875, passed an ordinance for the relief of the Times Company, ordaining that the city auditor be directed to draw his warrant in favor of the Times Company for \$507.61, and making an appropriation for such payment, which ordinance was approved by the mayor. Alleging that the Times Company had received all that it was entitled to under the contract, the petition states that the auditor was about to draw his warrant on the treasurer for said additional sum, which the comptroller would countersign and the treasurer pay; that the said company had no right to claim that sum, nor the city council authority to pass the said ordinance. A demurrer was sustained to the petition, and on appeal to the court of appeals, that judgment was reversed and the defendants have appealed to this court. The court of appeals held that the city council had no power to make the original contract, but that to the comptroller, under the charter of the city, the power belonged, and that if that contract did not cover the work for which the extra price was claimed, the city council could not, under the charter, make any agreement to allow it, or pass any ordinance appropriating money for its payment. The opinion of the court by Gantt, Judge, is so clear and conclusive on the questions involved, that we deem it unnecessary to do more than refer to, and adopt it. Judgment affirmed.

GANTT, P. J., delivering the opinion of the court of appeals, said:

I. The circuit court, in sustaining the demurrer, asserted the power of the city council to make what appears on the record to be a donation of public money to a party not entitled to receive it by virtue of any legal claim. Evi-

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dently the power asserted has this extent; for the petition is explicit that the Times Company has received all which under its contract it was entitled to demand, that in full view of this fact the council awarded to it a further sum, which was demanded without warrant of law and in contravention of the terms of the contract made by the Times Company for the doing of the city printing. If the city was bound by its charter to make contracts in the manner herein prescribed for the doing of all such work, and had no right to pay money except in pursuance of such a contract, the demurrer should have been overruled, unless some other cause not yet considered existed for sustaining it. That the city had no power to make a donation to give the funds in its treasury to whomsoever, as a mere gratuity, is well settled. *Hitchcock v. The City*, 49 Mo. 484. It is extraordinary that so anomalous a power should ever have been gravely asserted. It is totally inconsistent with the idea of constitutional and legal government. It would place all the property of a municipality at the mercy of a corrupt board of managers, by whatever name they might be known, and would reduce all taxpayers of such a municipality to a condition in which they might look with envy upon the subjects of any tolerably administered despotism.

II. The 2nd section of the 11th article of the charter of St. Louis, (Sess. Acts 1870, p. 485,) declares "The parties having the contract for the public printing of the city shall do all the job work required to be done by law or ordinance, or which is to be paid for by the city directly or indirectly, and it shall not be lawful to cause any printing to be done or paid for except in the manner authorized by this article." Looking then to the mode prescribed by article 11 for causing to be done or paying for the printing of the city, we find that section 1 provides that "the contract for all city printing shall be entered into by the comptroller as follows," &c., &c. Then follow rules for awarding work to the lowest and best bidder, "provided that until

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the awards are confirmed, the comptroller," (not the city council) "may contract for the city printing in the meantime." Section 3 ascertains what shall be printed and how soon. Section 4 declares the manner in which the reports of the mayor and other officers shall be printed and when. Section 5 directs that all printing required by law, ordinance or the officers of the city, and the purchase of all the stationery shall be done under the supervision of the register, &c. "And no publication or printing of reports or statements of officers shall be permitted or paid for except when done in the manner herein described."

It thus appears that great care has been taken to prevent any city printing whatever to be done or paid for except by virtue of a contract to be awarded to the lowest and best bidder; that to the comptroller, and not the city council, is given the power of making any such contract; and that it is industriously declared that it shall not be lawful to cause any printing to be done or paid for except as authorized by article 11. Language can hardly be more pointed or guarded. Any one unacquainted with the past history of St. Louis would, on examining the charter, be apt to conclude that great abuses in times past had admonished those in charge of the interests of the city, of the danger of committing the power of contracting or paying for city printing to the legislative body, and the expediency of conferring it upon an officer who was required to give security for the faithful performance of his duties. This intention appears on the face of the charter of 1870 as clearly as if it had been stated in a formal preamble. The city council, then, is absolutely forbidden to cause any printing to be done or paid for except, &c., &c. When printing has been done according to the terms of article 11 the city council may and must appropriate money for its payment. But everything beyond this is *ultra vires*.

Even if it were true that (in some manner certainly not shown by the present record) the city had incurred a liability to the Times Company, by reason of transactions

not within the scope of article 11, it would be wholly inadmissible for the city council under the prohibitions of the charter to assume to do by indirection what is directly and expressly forbidden to any functionary of the city government or all of them together, and to appropriate money for the satisfaction of the demand. The plain duty of the council would be to refer the subject to the courts of the State; and where it attempts, in place of this, to determine the validity of the claim and provide for its payment, it is guilty of a plain usurpation of power and a wanton waste of the money of the city.

III. It is, however, contended that the council has power to compromise a claim made against the city, and that the ordinance may be justified under this power. We cannot see how this power can be claimed in the face of the positive prohibitions of section 2, article 11; and we are of opinion that none of the authorities relied on by the respondent will support the pretension. We cannot see to what purpose our attention is called to the foundations on which all contracts must rest when the parties to them have full power to contract, for in the present instance we have to deal with a disability on the part of one claiming to be a contracting party, to make any contract whatever. If we were considering the true construction of a general grant of power without especial limitations we would be engaged in a task very different from that which now occupies us.

The counsel for respondents calls our attention to section 1, article 1, of the revised charter of the city. This section confers on the city the power to sue and be sued, to levy and collect taxes, to appropriate the money of the city, and thence he argues that whereas a dispute had arisen between the city and Times Company growing out of a lawful contract, to settle which the parties might have had a recourse to a court of justice, therefore, the city had a right to settle and adjust it by compromise out of court. We are surprised that it did not occur to the learned coun-

sel that this argument by proving too much, proves nothing. If it has any force, the council might have dispensed altogether with the partial contract made by the comptroller. The contract made either did or did not cover the work for which an extra price is claimed. If it did cover it, there is no shadow of foundation for any payment not contemplated by the contract. If it did not cover it, in respect of this work there was no contract, and yet the council undertakes to pay for work which has not been done as provided by article 11; that is, undertakes to do what section 2 of that article expressly forbids.

We are indisposed to enter upon an examination we do not think relevant. It is, of course, quite clear that if A and B, being under no disability to contract, have entered into an agreement, it may, so long as it remains executory in whole or in part, be rescinded by mutual consent, and this mutual consent to rescind may, so long as there is something on each side to be done or forborne, form an adequate legal consideration for the rescission. But it is quite otherwise when the contract has been fully executed by either party. Then a definite right to a definite thing or sum has accrued; neither more nor less than this is claimable and any agreement by the party liable to pay it, to pay anything further must either rest on some new consideration or be *nudum pactum*. When the party attempting to do what then becomes necessary, *i. e.* to make a new contract in respect of the excess, is by law disabled from making any contract whatever on the subject, it is obviously idle to consider what he ought to do if he were free from the disability.

Therefore, we are of opinion that the city council had no power to make any contract whatever in relation to the city printing, that power being given exclusively to the comptroller; that it was moreover and industriously forbidden to pay any money for city printing except on contracts made by the comptroller pursuant to article 11; that according to the allegation of the petition the city

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council is attempting either to make an independent contract with the Times Company and to pay the city's money under the contract, or else to pay out the city's money to the Times Company without any contract at all; that in either case it is attempting to do something for which not only no express power exists, but which it has been expressly forbidden to do; that the case before us is, in the language of the Supreme Court of Missouri, (*Hooper v. Ely*, 6 Mo. 505, 508, *loc. cit.*) "not a case of an injudicious exercise of a given power, but a naked assumption of power which it is our duty to check."

HALLIHAN V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant*.

Negligence: A CASE OF CONTRIBUTORY NEGLIGENCE ON THE PART OF PLAINTIFF'S INTESTATE DEFEATING RECOVERY. In an action against a railroad company to recover damages for the killing of plaintiff's husband, the evidence showed the circumstances of his death to have been as follows: Deceased was a repairer of cars, of some years experience, in the service of another company, and was familiar with defendant's freight yard, and knew that the work of switching and making up trains was constantly going on there. He also knew the customary mode of doing this work. Defendant had in its yard a repair track, and separate from it, a track known as a transfer track, which was specially set apart for cars whose contents were to be transferred to other roads. On the day of the accident defendant's car repairer was engaged in inspecting a car standing on this transfer track, when deceased happened to pass by. He called to deceased to look at some work that had been done upon the car. Deceased was in the act of complying with this request, and was probably standing or stooping on the track at one end of the car, when another car switched down the track from the opposite direction in the usual manner, struck the first and sent it forward several feet, running over him and inflicting the injuries of which he died. Defendant's car repairer, (who was the only eyewitness,) testified that the accident happened almost the instant he spoke to deceased. The evidence tended strongly to show that there was a brakeman in charge of the colliding car, but that it would

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have been impossible for him, if he was on the look-out, to see deceased. *Held*, that plaintiff was not entitled to recover.

Appeal from Jackson Circuit Court.—HON. S. H. WOODSON,
Judge.

REVERSED.

Geo. W. Easley for appellant.

Tichenor & Warner for respondent.

SHERWOOD, C. J.—Action for damages for injuries resulting in the death of plaintiff's husband. Plaintiff had judgment for \$5,000. The yards of defendant, where the accident occurred, are about ten acres in extent, and covered with a net-work of tracks, where the switching of cars and the making up of trains was going on almost continuously during the busy season. It seems to be the customary manner of switching cars in the yard of defendant for the engine to take the cars up toward the bridge then "kick" them off, when they are cut off by yardmen to run on the different tracks wherever wanted; and that cars cannot be coupled at all, without the cars switched have acquired a sufficient momentum to strike the cars to which they are to be coupled, with a considerable degree of force, enough to move the cars with which they come in contact, a distance of several feet. Harris, a car repairer of defendant's cars, was, at the time of the accident, at the south end of a car recently repaired and engaged in inspecting it. That car stood on a track running near the freight depot, and close to the platform of the depot, which track was used by defendant for transferring freight from defendant's road to others. There cars would be placed which had to be unloaded into or loaded from, the cars of other roads. This track was entirely distinct and apart from the repair track. South of, and below the car being inspected, on the same track, and distant nearly a car's length, was a string of fifteen or twenty cars, and

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to the north, or in the direction of the bridge, there stood one car, though not, it seems, on the same track. There was a switch 100 yards north of the car Harris was examining, the track there inclining to the south from the switch. About 175 feet from the freight depot stood a tool house some ten by twelve feet in size, six or seven feet from the track, where that, after running south from the switch, bore off to the west before reaching the tool house. There was evidence that this house would in all probability obstruct the view of cars coming down the track, but that a man standing on the freight depot platform, could see a car running down the track, if he looked.

While Harris was engaged in the work of inspection, and either under the south end of the car, or else standing on the track at the south end of the car, Hallihan, who was a car repairer of the Mo. R., Ft. S. & G. R. R. Company, had been so for several years, and was thoroughly conversant with the custom of defendant's yards in respect to its method of distributing cars by means of running switches, being accustomed to being about the yards every day, came along on the freight depot platform, and while there or else near Harris, the latter spoke to him to look how certain repairs had been done on the car being inspected. Hallihan, it seems, complied, or attempted to comply with the request made him, when a freight car switched in the usual way, and not coming down very fast, drove the car Harris was examining a distance of seven or eight feet, ran against Harris and over Hallihan, resulting in the death of the latter. The position Hallihan occupied at the time of the fatal occurrence, it is impossible to determine. Harris says: "I had no time to look to see what deceased was doing, the accident was so sudden. I should judge that, if he had time after I spoke to him, he was stooping down looking at the car when the accident happened. I don't know whether Hallihan was stooping down on the track looking at the car. The accident happened so quick after I spoke to him that I don't know what was

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done; it was almost the instant I spoke that the accident happened; there was no time for looking after the words were spoken." This witness also states that he looked immediately after the cars came together, and saw no brakeman on the car or near there; that it was not impossible for a brakeman standing on the car coming down, when within four car lengths, or 128 feet, to see Harris and Hallihan behind the car, though there was "great improbability of it." There was positive testimony of several other witnesses that there was a brakeman on the car which caused the injury.

The foregoing was the substance of the testimony, and upon that we are called on to say whether the court below erred in its refusal to give, at the instance of defendant, an instruction in the nature of a demurrer to the evidence. We think such an instruction should have been given, and these are our reasons therefor: There is nothing in the evidence adduced at the trial to show that defendant was aware of the perilous position in which Hallihan had placed himself, or that, even if thus aware, the injury complained of could have been prevented; for the testimony of Harris conspicuously shows that the negligent act of Hallihan, and the act of defendant causing his death were, to all practical intents and purposes, simultaneous or concurrent acts. Harris calls to Hallihan, the latter responds, or attempts to respond to the call, and immediately the car being examined is struck. So quickly does the one event succeed the other, that Harris will not undertake to say what the position of Hallihan was when receiving the injury. If Harris, in the immediate presence of, and in contiguity to, Hallihan, was not able to discover his position, would it not be altogether unreasonable to demand that a brakeman, if on the incoming car, should be required to do more? And for failing to do this, to demand that the company be held liable?

Liability is never created except by the non-performance of duty, but it was not a failure to perform a duty,

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because the defendant failed to anticipate that Hallihan would prove a trespasser on its track. The defendant company had as much right to a free and unobstructed use of that track, and of its yards, and as little cause to suspect or anticipate an interference with those rights, as has the honest farmer for similar unfavorable anticipations, when driving his team afield within his own lawful inclosure, and on the soil of his own homestead. The case is even stronger in behalf of the company in consequence of the peril attendant on and incident to coming in contact with machinery of the dangerous character which the prosecution of its business compels it to employ. A person would, perhaps, be guilty of but slight negligence while attempting to cross, or temporarily to obstruct the roadway of a slow moving farm wagon, while he would be justly held guilty of the extreme of rashness, should he attempt to cross, or to temporarily obstruct the roadway of a moving car.

These remarks, applicable in all instances where a railroad company is engaged in distributing cars, and making up trains in its own private yards, where it owes no special duty to the general public, as in the case of streets, public crossings and the like, apply with unwonted force in the present instance; for not only was Hallihan not engaged in the exercise of a legal right, but he incurred a special risk by venturing upon the transfer track of defendant, and undertaking to examine a car there, when it must be presumed from the facts in evidence, that he was familiar with the peril his rash act invited. That track was devoted to the particular purposes which the evidence discloses, and there was no ground for the presumption that the track in question would be used for any other purpose than those mentioned, or that defendant's servants thus engaged in switching the cars, would anticipate the unaccustomed and unwarranted use to which the track was applied. Now, if it be true, as before stated, that liability can only result from a non-performance of duty, and if it be also true that it was not the duty of de-

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fendant to anticipate a failure on the part of Hallihan to observe the most obvious and ordinary dictates of prudence, then of necessity it follows that defendant, failing in the performance of no duty, has incurred no liability. If the defendant's servants with knowledge of Hallihan's dangerous position, or with good grounds to suspect his danger, had willfully or recklessly permitted the car being switched to strike the one being examined, a very different question would be presented. But there is no element of willfulness in this case, and therefore in this respect it is not distinguishable in principle from cases heretofore decided by us, where we held as a matter of law that no cause of action existed. *Maier v. A. & P. R. R. Co.*, 64 Mo. 267; *Harlan v. St. Louis, K. C. & N. R. R. Co.*, 64 Mo. 480. For the foregoing reasons the judgment will be reversed. All concur.

BARTON COUNTY, Appellant, v. HARRINGTON.

Equity: COUNTY COURT'S CONTROL OVER COLLECTOR. The county court having accepted from the county collector a bond and mortgage to secure a delinquency in his accounts, afterward surrendered and canceled them without receiving payment of the debt. This action being brought by the county to set aside the order of surrender and cancellation as having been illegally and fraudulently made, and to reinstate the bond and mortgage; *Held*, that there was no ground for the interposition of a court of equity.

Appeal from Barton Circuit Court.—HON. JNO. D. PARKINSON,
Judge.

AFFIRMED.

Robinson & Harkless and J. C. Cravens for appellant.

Edward Buller for respondent.

NAPTON, J.—This is a petition to the circuit court of

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Barton county, stating that the defendant was collector of the county, and in 1871 was a defaulter for upward of \$2,000; that on the 8th day of November of that year, the county court accepted a bond from him and his securities for that sum and a mortgage of certain real estate. The bond was payable in three years, and bore six per cent. interest. The petition proceeds to state that in 1872 the said court combining and confederating with said Harrington, and for the purpose of cheating and defrauding the county, ordered the clerk to cancel said bond and enter satisfaction of said mortgage and surrender the same to defendant, without receiving the money due, and prays the court to set aside this order and hold it void. There was a demurrer to the petition, and it was sustained.

The case of *Turner v. Clark Co.*, 67 Mo. 243, was an ejectment, and the title of the county was by purchase under a foreclosure of a mortgage given by the collector under circumstances similar to those in the present case, and the title was held good. A suit upon the collector's official bond was dismissed and a mortgage taken, and a foreclosure of the mortgage was had, and the only question in that case was as to the validity of the title so acquired by the county. In the case now under consideration, a mortgage was taken in 1871 to secure the delinquency of the collector for \$2,000, but in 1872 the county court directed the clerk to cancel the bond, and enter satisfaction of the mortgage, and surrender the same to the collector. The county now applies to a court of equity to set aside this order of the county court. In the Clark county case the mortgage was foreclosed and the title of the county, as purchaser, was questioned in an action of ejectment. In the present case the mortgage was surrendered, and the bond it was given to secure was canceled, perhaps for the reason that the court discovered or believed that they had acted unwisely in allowing such a substitute for the security of the official bond of the collector, and as preliminary to ordering a suit on the official bond.

It is true that in the Clark county case this court did not pronounce such mortgages a nullity, but it was, nevertheless, observed, that "the county court had no power to exact such a mortgage, certainly none to substitute it for the original bond and thereby discharge the securities," and as it was voluntarily given and foreclosed, the statute did not forbid the county from taking the title acquired under the foreclosure. But in this case the mortgage was canceled and no proceedings had under it, and the court is asked to set aside such cancellation.

We are unable to see any ground for the interposition of a court of equity. If the action of the county court in 1872, cancelling this bond and mortgage, was illegal, then the county had nothing to do but proceed on this bond and mortgage. The same facts now alleged could have been alleged and proved in an action at law on this substituted bond and mortgage. If the action of the court in allowing the substituted bond and mortgage was illegal, the remedy on the official bond of the collector had not been impaired. In either event there was no need of the interposition of a court of equity. There are allegations of fraud and conspiracy in the case, but we presume they were intended merely to give some color to an equitable jurisdiction. It is not easy to conceive of any fraudulent motives that could induce a county court, who had no personal interest in the matter, one way or the other, to annul their first action, which, whatever may be thought of its validity abstractly, was clearly impolitic, unwise and contrary to the spirit of our revenue laws. A delay of three years was given upon securing six per cent. interest, whilst our statute evidently intends such defalcations to be promptly collected by suit on the official bond of the defaulting officer. The object of the bill seems to have been to get the advice of the court as to which legal remedy the county should take, whether to sue on the original official bond of the collector or the substituted one; but it is not

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the province of courts of equity to advise in regard to a choice of legal remedies. Judgment affirmed. The other judges concur.

SUMNER V. COTTEY, *Appellant*.

1. **Lease of an Organ:** SALE BY LESSEE PASSES NO TITIE. One R received an organ from plaintiff under a written lease, conditioned for the payment of rent monthly, and further conditioned that R should have the privilege of purchasing at any time during the continuance of the lease at a price fixed, in which event all previous payments of rent should be deducted. The title was expressly reserved to plaintiff. R, without purchasing, sold and delivered the organ to defendant, representing it to be his own. Defendant bought in good faith, without notice of the lease, and paid full price; *Held*, that he, nevertheless, got no title; and it was immaterial that the lease was not proved or acknowledged and recorded.
2. **Defect of Parties:** PRACTICE. It is too late to raise the objection of defect of parties after verdict.

Appeal from Knox Circuit Court.—HON. JNO. C. ANDERSON,
Judge.

AFFIRMED.

L. F. Cottey for appellant.

W. C. Hollister for respondent.

HENRY, J.—The plaintiff sued for \$265 damages for the conversion of an organ. Defendant's answer denied plaintiff's ownership, and alleged that he purchased the organ of W. C. Ray, at the price of \$165, which he paid; that at the time of the sale Ray had the actual and notorious possession of the organ, claiming it to be his own, and that defendant, believing him to be the owner, purchased it, not having any notice whatever that plaintiff had or pretended to have any claim to it; that at the time of the purchase from Ray and payment for the organ, Ray

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was the legally authorized agent of plaintiff to sell organs and sewing machines in Knox county, Mo.; that at the time of the sale and payment of the purchase money as aforesaid, plaintiff had no lien on said organ in writing, proved or acknowledged and recorded as required by law. The cause was tried by the court, and there was a finding and judgment for plaintiff, from which defendant has appealed.

The evidence for plaintiff proved a lease in writing of the organ by A. Sumner & Co. to Ray, May 17th, 1877, at \$10 per month, payable monthly in advance, to be used only by the family of said Ray, at his residence in Edina, Missouri, and not to be removed therefrom without the consent of said company in writing, said company reserving the right to terminate the contract at any time on failure to pay the rent, or when they should fear for the safety of the organ, Ray agreeing to take good care of and return it in good order to said A. Sumner & Co. at the expiration of the term for which the rent should be paid in advance. Ray also had the privilege, at any time during the continuance of the contract, to purchase the organ at \$165, all previous payments for rent to be deducted from that price. This privilege, however, was in no way to interfere with the right of said Sumner & Co. to control the organ, the property therein remaining in said company. The evidence for plaintiff also showed that Bowen was a *bona fide* purchaser of defendant's note to Ray and did not collect it as plaintiff's agent; and that plaintiff demanded the organ of defendant, who refused to deliver it to him.

The evidence for defendant showed, that during the years 1871, 1872 and 1873, Ray was the sole agent of plaintiff in Knox county to sell organs and sewing machines, that defendant bought the organ as alleged in the answer, on the 6th day of July, 1871, and executed his note to Ray for \$165, the price agreed upon, which he afterward paid to Benjamin Bowen, who was collecting agent for plaintiffs; that he did not know that plaintiff had any claim on the organ; that he bought it of Ray on his

representation, "that he was the owner, and not of him as agent." L. F. Cottey testified that he was present when defendant bought the organ; that Ray claimed to have bought it of plaintiff; that defendant purchased of Ray, not as agent of plaintiff but believing him to be the owner.

For plaintiff the court gave the following instructions:

1. If the court sitting as a jury shall believe from the evidence that W. C. Ray on the 17th day of May, 1871, hired of plaintiff the organ in question to be used only by W. C. Ray or his family at his residence in Edina, and agreed to pay the plaintiff \$10 per month for the rent of the same, then in that case Ray was not the owner thereof and could not convey any title thereto to defendant.

2. Although the court sitting as a jury may believe from the evidence that the contract read in evidence was a conditional sale of the organ in question to the said Ray, yet if the court should further believe from the evidence that the title of said organ by said contract was to remain in the plaintiff until all the purchase money was paid by said Ray in full to the plaintiff, and that said Ray had never paid the purchase money in full, then in that case Ray was not the owner of said organ and had no right to convey the same to the defendant.

The following asked by defendant were refused: 1. If the court sitting as a jury shall believe from the evidence that plaintiff and Ray made and entered into the written instrument introduced in evidence, that plaintiff on or about the date of said instrument delivered the organ in question to Ray and permitted him to have actual and absolute possession thereof from said date until the sale to defendant, that said instrument is the only contract either written or verbal between plaintiff and Ray relating to said organ, that defendant purchased said organ from said Ray in good faith, and at the time of the purchase had no knowledge or information of the said written instrument, and did not know that plaintiff had or claimed to have any lien on, or title to, said organ, then in that event the said

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written instrument would be a conditional sale. And if the court further believes from the evidence that said Ray represented to the defendant that he was the owner of said organ, and that defendant purchased the same in good faith believing that Ray was the owner thereof, and executed his note payable to said Ray for the purchase money, and afterward paid said note when the same became due; that plaintiff previous to said purchase by defendant did not have an instrument in writing signed and acknowledged by said Ray and recorded in the office of the recorder of deeds for Knox county, in which instrument in writing were specified and set forth the terms and conditions between plaintiff and Ray relative to said organ; and that defendant, previous to his said purchase, did not have any information or notice whatever of the claim of the plaintiff, then the finding should be for the defendant.

2. If the court sitting as a jury shall believe from the evidence that the sale from Sumner to Ray was conditional, but that the organ in question was delivered to Ray unconditionally on the payment of \$10, then the title vested in Ray on the delivery, so that he could clearly confer title to an innocent purchaser in good faith and for a valuable consideration; and in that case the finding should be for the defendant.

3. If the court sitting as a jury shall find from the evidence that on the 6th day of July, 1871, and for a long period of time prior thereto, the said Sumner had held out the said Ray as his accredited agent in Knox county, in the sale of organs and sewing machines; although the court may further find from the evidence that the said Ray did at the time of the sale of the organ in question to the defendant on the 6th day of July, A. D. 1871, represent the organ in question to be his property; yet the holding out of the said Ray to the community as his accredited agent by the said Sumner was an implied warranty for his good faith and authority to act in the sale of organs and sewing machines in Knox county; and if the court shall

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find from the evidence that the defendant bought the organ in question in good faith, and for a valuable consideration, and without any knowledge or notice of the plaintiff's lien or claim on said organ, then the finding should be for the defendant.

4. In order to create a lien for the purchase price of a chattel as against an innocent purchaser for a valuable consideration, there must be a conveyance to that effect in writing, proved or acknowledged, and filed for record in the recorder's office of the county where the property is situate.

5. When one of two innocent parties must suffer from the fraud of a third, the loss should fall on him who enabled such third person to commit the fraud. In this case the loss should fall on Sumner who, by intrusting Ray with the possession of the organ, enabled him to commit the fraud, rather than upon the defendant who acted in good faith and with proper caution.

6. Before the plaintiff can recover he must show conclusively that he used all due diligence, and was guilty of no laches in the prosecution of his claim. If Ray continued to act as the agent of Sumner in the sale of organs and sewing machines in Knox county, for more than two years after he had disposed of this property, and during all that time only paid Sumner \$10 on said organ, then that is a circumstance which proves Sumner guilty of laches, and in that case the finding should be for the defendant.

The finding of the court was for the plaintiff for \$165 with interest on the same at six per cent from the commencement of the suit.

That a conditional sale of personal property with delivery of possession to the vendee, the vendor reserving the title to the property until paid for, does not invest the vendee with a title which enables him to sell it even to a *bona fide* purchaser without notice of the agreement between the vendor and vendee,

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and although no writing evidencing such agreement be recorded, has been so often declared by this court, that it must be regarded as finally settled in this State. *Parmlee v. Catherwood*, 36 Mo. 479; *Little v. Page*, 44 Mo. 412; *Griffin v. Pugh*, 44 Mo. 326; *Wangler v. Franklin*, 70 Mo. 659. Here, however, was no sale, but a lease in which the lessee stipulated for the privilege of purchasing within the year for which the organ was let. The instructions for plaintiff are unexceptionable, and defendant was not entitled to those he asked.

The defendant's third instruction asked the court to find for him on a theory in conflict with the pleading and proof. He alleged in his answer that he bought the property of Ray, not of the plaintiff. He and L. F. Cottey both testified that he purchased of Ray not as agent of plaintiff but as owner. If he had purchased of Ray as agent of the plaintiff, a very different question would have been presented, and his refused instructions might have been given.

There is nothing in the point that the lease was made by A. Sumner & Co. There was no plea in abatement alleging that there were other parties who were jointly interested with plaintiff in the property. Nothing except the signature of A. Sumner & Co. to the lease to show that any one except plaintiff was interested in the organ. Throughout the trial, plaintiff was treated and spoken of as if he alone composed the firm, and in his testimony he stated that he had been engaged in business in St. Louis for sixteen years, and in May, 1871, was dealing in pianos and organs, and in that month leased the organ to Ray. The point was not made in the circuit court, either in the motion for a new trial or in arrest of judgment, but we hold that it is too late after a trial and verdict to make that objection. Judgment affirmed. All concur.

2. DEFECT OF PARTIES: practice.

STEPHENSON V. STEPHENSON, *Appellant*.

1. **Swamp Lands.** The fact that a tract of land was swamp land on the 28th day of September, 1850, is not of itself sufficient to confer title upon the State, or the county claiming by grant from the State. It is necessary, in addition, that it shall have been selected as swamp land and the selection approved by the Secretary of the Interior, or if not so approved, the tract must fall within the provisions of the act of Congress of March 3rd, 1857.
2. ———: CERTIFICATE OF REGISTER OF LANDS AS EVIDENCE. A certificate from the Register of Lands showing that a particular tract is on the list of swamp lands in his office, is no evidence of title in the county (as provided by section 9, page 868, Wagner's Statutes), unless it further shows that the tract has been approved as swamp land by the proper authorities of the United States.

Appeal from Macon Circuit Court.—HON. JOHN W. HENRY,
Judge.

REVERSED.

Geo. W. Easley for appellant.

Henry Flanagan and *W. H. Sears* for respondent.

HOUGH, J.—This was an action of ejectment. The plaintiff claimed title under the swamp land grant of September 28th, 1850, and the defendant under the railroad grant of June 10th, 1852. The case was tried on the theory that it was only necessary for the plaintiff to show that the land sued for was in fact swamp land on the 28th day of September, 1850. The fact that it was swamp land at that date within the meaning of the act of Congress, would be sufficient to show that it was not included in the railroad grant of 1852. But that fact was not of itself sufficient to confer title upon the State, or the county claiming by grant from the State. In order that the title might vest in the county, it was necessary that the tract in question should have been selected as swamp land, and such selection must have been approved by the Secretary of the In-

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terior, or if not so approved, the tract must fall within the provisions of the act of Congress of March 3rd, 1857. No claim was made under the act of 1857, but a certificate of the Register of Lands was offered in evidence, bearing date June 9th, 1874, to the effect that the land sued for was on a list of swamp lands in Macon county, on file in his office. This certificate, however, fails to show that said land had ever been confirmed as swamp land, but on the contrary, it shows that it had been "approved to the railroad." This certificate, therefore, could not be *prima facie* evidence of title in the county, as provided in section 9, 2 Wagner's Statutes, page 868. The lists referred to in this section, are lists of swamp lands which have received the approval of the proper authorities of the United States. The judgment of the circuit court must be reversed and the cause remanded. All concur, except HENRY, J., not sitting.

RICHARDSON V. PITTS *et al.*, Plaintiffs in Error.

Corporation: FAILURE TO BECOME INCORPORATE: LIABILITY OF ASSOCIATES AMONG THEMSELVES FOR DEBTS OF ASSOCIATION. The managers of an association supposed by its members to have been duly incorporated, in pursuance of authority given by their associates, made expenditures and incurred liabilities on behalf of the supposed corporation. It turned out, however, that owing to failure to file the requisite certificate with the Secretary of State, the association had never become a corporation, in consequence of which the managing members became personally bound and did pay all the debts. *Held*, that their associates were bound to share the loss with them, each in proportion to the stock subscribed by him, and the fact that any subscriber had paid up his subscription in full, or had paid the double liability to which stockholders in corporations were at one time subject, did not exempt him from liability for further contribution, but he was entitled, upon an accounting, to be allowed for such payments.

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Error to Howard Circuit Court.—HON. GEO. H. BURCKHARTT,
Judge.

AFFIRMED.

The circuit court decreed that an account be had and taken between plaintiffs and defendants, as partners, each party to be held responsible in proportion to stock subscribed to the articles of association.

Jas. H. Robertson and *N. C. Kouns* for plaintiffs in error.

C. A. Winslow and *Shackelford, Herndon & Herndon* for defendants in error.

HENRY, J.—Plaintiffs and defendants attempted to incorporate "The Roanoke Central District Mechanical & Agricultural Association," but failed to file articles of association with the Secretary of State, and, therefore, under the decision of this court in *Hurt v. Salisbury*, 55 Mo. 310, the company acquired no corporate existence. In order to carry on the business of the supposed corporation, plaintiffs, selected for the purpose by their associates, expended, and in their individual capacity became liable, as sureties, for the corporation, for about the sum of \$3,600. Judgments were obtained against the company as a corporation, and its real estate was sold and purchased by the association, at the price of \$2,000, which was paid by certain of the members named in the petition, each paying an amount specified in the petition. There remained of said judgments unpaid a balance of \$537.29, and there were also other debts outstanding against the association. This suit was against all the members of the company, for an account and settlement of its affairs. The original petition alleged the foregoing facts and asked a decree for the sale of said land for the payment of said debts, and for the payment by each member of his proportional share to make

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up any deficiency, and for general relief. No bill of exceptions was preserved, and, therefore, we have to consider only such errors, if any, as appear in the record proper.

There was a demurrer to the original petition, which was overruled, but the defendants afterward filed their answer, and thereby waived the demurrer. No exceptions were saved to any declaration of law, or the refusal to make any, but as this is a chancery cause, it is immaterial, if the court rendered the proper judgment, whether it erred or not in giving or refusing declarations of law. The third assignment of errors, that the petition is multifarious, was not raised by demurrer, and cannot now be considered. The court did not err in ordering an amendment to the original petition to bring before it all parties interested in the controversy. The court had jurisdiction. It was a personal action and a portion of the defendants resided in Howard county, where the suit was instituted. It does not matter that there was no verdict or finding of facts upon which the judgment was rendered. The court was not required by law to submit issues to a jury for trial. If it had in its discretion done so, it could have disregarded the verdict of the jury in rendering a judgment in the case. *Burt v. Ryner*, 48 Mo. 309; *Deitrich v. Franz*, 47 Mo. 85. The objection is equally futile, that the court submitted a question of law to the jury; the court ultimately tried the cause without the intervention of the jury, as it was authorized to do.

This brings us to the main question in the case, and the only one, we think, worthy of serious consideration. Were all the members of the association liable for its debts? It is immaterial whether they be called partners or are otherwise designated. They inaugurated an enterprise, and appointed certain of their number for all, to purchase and make improvements upon land necessary to the business they contemplated; they adopted articles of association, with a view to incorporation, but in consequence of a misconstruction or misunderstanding of the law, failed to

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become incorporated; and the managing members, who incurred the debts became personally liable under the decision of *Hurt v. Salisbury*, supposing the association as a corporation bound; and the simple question is, whether the other members of the association are exempt from liability, because they have paid for all the stock subscribed for by them, and some of them under the supposition that it was a corporation, double the amount of their subscriptions under the law applicable to stockholders in corporations. We think not; the debts were incurred for them by their associates appointed for the purpose, and it would be grossly inequitable and unjust to throw the whole burden upon them. In a settlement those who have paid double the amount of stock subscribed by them should be credited with the amount so paid without regard to the double liability imposed upon holders of stock of a corporation. That has no application to the members of this unincorporated association. These views are in full accord with those expressed in the following cases, and are so equitable and just as to commend themselves if no authority could be cited to sustain them: *Hill v. Beach*, 12 N. J. Eq. 31; *Pettis v. Atkins*, 60 Ill. 454; *Flagg v. Stowe*, 85 Id. 164; *Abbott v. Smelting Co.*, 4 Neb. 416. They were substantially adopted and applied by the circuit court in the judgment rendered herein, and that judgment is affirmed. All concur.

HULETT V. NUGENT, *Appellant*.

1. **Unlawful Detainer:** JUDGMENT MUST NOT RUN AGAINST SURETIES IN APPEAL BOND: PRACTICE. A judgment in the circuit court in an action of unlawful detainer in favor of the plaintiff, should run against the defendant alone, and not against the sureties in his appeal bond given in the justice's court. If it includes the latter, since a judgment is an entirety, it will be reversed *in toto* by the Supreme Court.

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2. **Practice in Supreme Court:** EVIDENCE: MOTION FOR NEW TRIAL. The Supreme Court will not inquire into the correctness of the action of the trial court in ruling on questions of evidence, unless the question is presented by the motion for new trial.
3. **Summons, Appearance waives Insufficiency of.** A defendant, by appearing and defending the suit, waives all objections to the sufficiency of the summons.
4. **Landlord and Tenant:** IMPLIED ACCEPTANCE OF TERMS OF TENANCY. Where a landlord sends his tenant already in possession a written permit to remain for two years longer, free of charge, and the tenant receives the same and remains without notice to the landlord that he declines the terms offered, he will be deemed to have accepted them, and upon the expiration of the term may be dispossessed without notice to quit.

Appeal from Clark Circuit Court.—HON. JNO. C. ANDERSON,
Judge.

REVERSED.

Givens & McKee for appellant.

Matlock & Hiller and *Ben. E. Turner* for respondent.

NAPTON, J.—This was an action for the unlawful detainer by defendant of eighty acres of land belonging to plaintiff, brought on the 12th day of November, 1875. The summons required the defendant to “appear before the undersigned justice of the peace, within and for said county of Clark, at Peaksville, in said county on, &c.” A judgment by default was rendered by the justice, after which the defendant made a motion to set it aside, which was overruled. Appeal was taken to the circuit court, where the defendant appeared, but, as he says, only for the purpose of making a motion to dismiss, which he did on the ground that the writ of summons did not name any place for the appearance of defendant. This motion was overruled and the suit was tried by a jury. The plaintiff introduced evidence to show that he entered into a contract with defendant, which allowed defendant to remain in possession of the farm for two years from October

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14th, 1872; that it was in writing; that it was in these words: "Know all men by these presents, that I, Joseph Hulett &c., have this day leased to James Nugent the east half &c., for the term of two years," signed by plaintiff and dated October 14th, 1872. The defendant offered evidence to show that there was no contract between them, and that he refused to sign the one sent to him by plaintiff. There was also some evidence offered by defendant in regard to improvements he had made on the land prior to the fall of 1872, which was rejected by the court as irrelevant.

After the evidence was closed the court, at the instance of the plaintiff, gave the jury the following instructions: 1. If the jury believe from the evidence that on or about the 14th day of October, 1872, plaintiff and defendant entered into an agreement for the lease of the lands in controversy for two years, from the 14th day of October, 1872, to the 14th day of October, 1874, and that defendant directed plaintiff to execute said lease and leave it with Thos. Calvert for him, and that in pursuance of such agreement the plaintiff did execute said lease and leave it with said Calvert for defendant, then the delivery of the lease to Calvert was delivery to his principal (Nugent), and he is estopped from denying his tenancy under said lease; and if they believe said tenancy has expired under said lease, they will find for the plaintiff.

2. If the jury believe from the evidence in the cause that defendant leased the land in controversy from Hulett, on the 14th day of October, 1872, and that said lease was to expire at a time fixed in said lease, two years from the 14th day of October, 1872, and that defendant willfully and without force held over said lands after the termination of the time for which they were demised or let to him, then the jury will find for plaintiff.

3. If the jury believe from the evidence that in October, 1872, plaintiff and defendant entered into an agreement for a new lease of the lands in controversy, and that

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defendant authorized plaintiff to draw a lease or permit in writing and to deliver it to Thos. Calvert for him, and that said lease or permit was in fact drawn up in writing by plaintiff and delivered to Calvert for Nugent, then the delivery of the lease to Calvert was delivery to his principal, (Nugent,) and he is estopped from denying his tenancy under said lease.

The court refused to give the following instruction asked by the defendant: If the jury believe from the evidence that a lease was written and signed by the plaintiff, and that the same was sent to defendant, Nugent, who refused to sign or accept the same, then the jury will find for defendant.

The jury found for the plaintiff and the court gave judgment in his favor against the defendant for restitution of the premises, for damages for their unlawful detention and for the monthly value of the rents and costs, and also against the sureties in the appeal bond for the damages, monthly rents, and costs.

This judgment must be reversed because it is against the securities as well as the principal on the appeal bond, *1. UNLAWFUL DETAINER: judgment must not run against sureties in appeal bond: practice.* *Gunn v. Sinclair*, 52 Mo. 332; *Keary v. Baker*, 33 Mo. 603, and as it is an entirety, must be reversed as to the defendant also. *Covenant Mut. Life Ins. Co. v. Clover*, 36 Mo. 392; *Smith, Admr., v. Rollins*, 25 Mo. 411; *Rush v. Rush*, 19 Mo. 441.

As to the exclusion of certain evidence offered by defendant, it cannot avail in this court, since it is not one of the objections stated in the motion for a new trial. *2. PRACTICE IN SUPREME COURT; evidence: motion for new trial.* *Carver v. Thornhill*, 53 Mo. 283; *Concen v. St Louis & I. M. R. R. Co.*, 48 Mo. 556; *Saxton v. Allen*, 49 Mo. 417.

There is no dispute as to a proper service of the summons in the case, but an objection to it was made that "at Peaksville" was not a sufficiently specific designation of the place. Nothing is shown as to the size of Peaksville, or any difficulty in finding the

3. SUMMONS, A P-
PEARANCE WAIVES
INSUFFICIENCY OF.

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office where the justice transacted his official duties; but be that as it may, the defendant seems to have found no difficulty in reaching it after the trial, and moving to set aside the judgment by default, and when overruled, in taking an appeal. And when the case came up in the circuit court, although he professed to appear only to object to the summons, after his objections were overruled, he went on with the trial and took the chances with the jury and court. If there was any defect in the writ, he waived it. *Rippstein v. St. Louis Mut. Life Ins. Co.*, 57 Mo. 87; *Fugate v. Glasscock*, 7 Mo. 577; *Cannon v. McManus*, 17 Mo. 345.

The propriety of the instructions given is not seriously disputed. True, it is urged that the first should have been so modified as to confine the expiration of the lease to a time before the commencement of the suit; but it was apparent that the suit was not brought until more than three years elapsed after the written or oral permission, or lease as it is termed, was given to defendant.

It is also objected to the second instruction that the lease, being for a term of years and not in writing, should be construed as a lease from year to year, and required three months notice to terminate it. The writing sent to defendant was a permission to him, then in possession, to stay for two years longer, and it might be construed as a notice to quit after the expiration of the two years. It was a simple permission. No rent was exacted, or any duties on his part required, and therefore the instruction asked by defendant was properly refused. The signature of defendant was not required, and his acceptance was indicated by his continuance in possession, without any notice to plaintiff that he declined the possession under the terms offered.

As to the preponderance of evidence, it is useless to cite authorities that this court will not interfere in conflicts of evidence. There is, then, no error of the circuit court except in giving judgment against the securities on the appeal bond. We could enter the proper judgment here,

4. LANDLORD AND
TENANT: implied
acceptance of
terms of tenancy.

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but we think it would be more convenient to both parties to remand the case with directions to the circuit court to enter judgment against the defendant alone in accordance with this opinion. Judgment reversed and case remanded.

THE STATE V. NUGENT, *Appellant*.

1. **Criminal Law:** EVIDENCE OF ANOTHER OFFENSE, WHEN ADMISSIBLE: MURDER. On the trial of an indictment for one offense, evidence of another offense committed by the prisoner may be given against him if it tends to establish the offense charged, or any fact which is one of its constituent elements. Hence, in support of a charge of murder, evidence may be introduced to show that on several occasions previous to the homicide, defendant threatened, assaulted and attempted to kill the deceased.
2. ———: ———. Such evidence as the foregoing is admissible, not simply for the purpose of proving intent, but generally, in support of the charge of deliberate murder. It equally proves deliberation and intent.
3. **Practice, Criminal:** WITNESS. The State is not bound to furnish the defendant with a list of her witnesses before trial.
4. ———: REASONABLE DOUBT. If the trial court, after informing the jury what facts will constitute guilt on the part of the accused, further instructs them that before they can find him guilty those facts must be found beyond a reasonable doubt, that is sufficient. It is not necessary to go further and instruct as to the effect of a reasonable doubt of the presence of any one or more of the elements of the crime.
5. ———: INSTRUCTIONS. The trial court is not bound, unless requested, to instruct the jury as to the legal effect of evidence offered by defendant to establish his general reputation as a peaceable and quiet citizen.
6. ———: DELAY IN TRYING ACCUSED. This court will not interfere with the action of the trial court in refusing a prisoner's motion to be discharged from custody for delay in bringing him to trial, unless it is made to appear by the record that the delay was unreasonable.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

F. D. Turner for appellant.

1. The evidence of defendant's prior mistreatment of deceased should not have been admitted. *U. S. v. Armstrong*, 2 Curtis C. C. 446; *U. S. v. Mingo*, 2 Curtis C. C. 1; *Com. v. Hawkins*, 3 Gray 463; *Green v. State*, 13 Mo. 382; *State v. Schoenwald*, 31 Mo. 147; *State v. Foster*, 61 Mo. 552; *State v. Underwood*, 57 Mo. 45; *State v. Lane*, 64 Mo. 322; *State v. Goetz*, 34 Mo. 91; *State v. Harrold*, 38 Mo. 498; *Farrer v. State*, 2 Ohio St. 75; *Barton v. State*, 18 Ohio 224; *Reg. v. Oddy*, 1 Den. & Pearce Brit. Crown Cas. 266; *Reg. v. Butler*, 2 Car. & Kir. 221; *State v. Daubert*, 42 Mo. 246; *Walker v. Com.*, 1 Leigh (Va.) 574; *Shaffner v. Com.*, 72 Pa. St. 65; *Kinchelow v. State*, 5 Humph. 9; *State v. Shuford*, 69 N. C. 486; *Wiley v. State*, 3 Coldw. 372; *Lightfoot v. People*, 16 Mich. 507; *Mason v. State*, 42 Ala. 533; *s. c.*, 42 Ala. 543; *U. S. v. Mitchell*, 2 Dallas 357; Wharton Cr. Law, §§ 631, 632, 633, 634, 635, 650; *State v. Roberts*, 62 Mo. 388; *Dyson v. State*, 26 Miss. 385; *Hudson v. State*, 3 Coldw. 361; *State v. Creson*, 38 Mo. 373; 3 Greenleaf Ev., §§ 25, 53; *Com. v. Webster*, 5 Cush. 325; *People v. White*, 14 Wend. 111; *People v. Stout*, 4 Park. Crim. R. 127; *Reg. v. Dossett*, 2 Car. & Kir. 306; 1 Phillips Evidence, (Cow. & Hill Ed.) 644; Roscoe Crim. Ev., 92; *State v. Keene*, 50 Mo. 360; *State v. Sloan*, 47 Mo. 611; *Rex v. Birdseye*, 4 C. & P. 386; Starkie Evidence, 379; *State v. Braunschweig*, 38 Mo. 589; *State v. Dominique*, 30 Mo. 585; *Reg. v. Voke*, 1 R. & R. (Brit. Cr. Cas.) 531; 3 Russell Crimes, (9 Ed.) *289; *Reg. v. Bailey*, 2 Cox C. C. 311; *Rex v. Mogg*, 4 C. & P. 364; *State v. Rash*, 12 Ired. 383; *Stone v. State*, 4 Humph. 27; *Johnson v. State*, 17 Ala. 619; *People v. McCann*, 3 Park. Cr. R. 272; *People v. Williams*, 3 Park. Cr. R. 84; 1 Chitty Cr. Law, § 564.

2. The court should have instructed the jury that the evidence of prior acts was admitted only for the purpose of proving intent. *Com. v. Shepard*, 1 Allen 575; *Stout v.*

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People, 4 Park. Cr. R. 132. *State v. Watkins*, 9 Conn. 47; *Shaffner v. State*, 72 Pa. St. Rep. 63; *State v. Hart*, 66 Mo. 215; *Leonard v. Smith*, 11 Met. 332; *King v. Grant*, 3 Neville & Manning's Rep. 106; *McTavish v. Carrol*, 13 Md. 440; *O'Brien v. Hilburn*, 22 Texas 616; *State v. Wadsworth*, 30 Conn. 56; *State v. Neville*, 6 Jones 432; *Henry v. Everts*, 29 Cal. 610; *King v. Faber*, 51 Pa. St. 387; *Johnson v. Marshall*, 34 Ala. 522.

3. The defendant should have been apprised, before the trial, of the names of the State's witnesses. *Ray v. State*, 1 Greene 316; *Holbrook v. Nichol*, 36 Ill. 161; *Peers v. Davis*, 29 Mo. 190; *Graham & Wat. on New Trials*, p. 952; *Queen's case*, 2 Brod. & Bing. 312; *Ware v. Ware*, 8 Me. 54; *Wilson v. Clarke*, 27 Miss. 270; *Todd v. State*, 25 Ind. 220; *Keller v. Blasdel*, 2 Nev. 162; *Knox v. Bigelow*, 15 Wis. 415; *Morrow v. Hatfield*, 6 Humph. 108; *Stewart v. Durrett*, 3 Monr. 113; *Vannerson v. Pendleton*, 8 S. & M. 452; *Donnallen v. Lennox*, 6 Dana 89; *Price v. Ford*, 7 Monroe 399; 18 Eng. L. & Eq., 105; *Holmes v. McKinney*, 4 Monr. 5.

4. The court erred in refusing and failing to instruct the jury as to the effect of a reasonable doubt as to the existence of deliberation or premeditation. *Com. v. McKie*, 1 Gray 61; *State v. McCluer*, 5 Nev. 132; *Com. v. Kimball*, 24 Pick. 366; *West v. State*, 1 Wis. 209; *Henderson v. State*, 14 Texas 514.

5. Evidence of defendant's good character was admitted; it was, therefore, the duty of the court to have instructed as to its legal effect. *State v. Alexander*, 66 Mo. 161; *U. S. v. Roudenbush*, 1 Baldwin 514; *State v. McMurphy*, 52 Mo. 251; *State v. Matthews*, 20 Mo. 55; 1 Wharton Cr. Law, § 643; 2 Starkie Ev., 472.

6. Defendant's motion for a discharge should have been granted. *Robinson v. State*, 12 Mo. 595; *State v. Huting*, 21 Mo. 475; *Com. v. Sheriff*, 16 Serg. & R. 304; *Com. v. Phillips*, 16 Mass. 423. *Reg. v. Fuller*, 9 C. & P. 35; *Ex parte Stanley*, 4 Nev. 113; *Campbell v. State*, 11 Ga. 365; *Cooley Const. Lim.*, 311; *Rex v. Beardmore*, 7 C. & P. 497;

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Reg. v. Bridgman, 1 Car. & Marsh. 153; *Com. v. Prophet*, 1 Browne 135.

J. L. Smith, Attorney-General, for the State.

1. The defendant was not entitled to be discharged. *Nixon v. State*, 2 Sm. & Marsh. 497; *Ex parte Stanley*, 4 Nev. 116; *Ex parte Donaldson*, 44 Mo. 149.

2. The evidence of defendant's abuse of deceased, and of his previous attempts to kill her, was properly admitted. Wharton Crim. Law, §§ 635, 636, 639, 640, 647, 647a; Wharton Hom., §§ 701, 725; 2 Russell Crimes, (9 Ed.) 288, 289; *Reg. v. Voke*, Russ. & R. 531; *Reg. v. Weeks*, Leigh & Cave 18; *Reg. v. Roebuck*, 36 Eng. L. & Eq. 631; *Com. v. Bradford*, 126 Mass. 42; *State v. Rash*, 12 Ired. 382; *Johnson v. State*, 17 Ala. 618; *McCann v. People*, 3 Park. Cr. R. 272; *Stone v. State*, 4 Humph. 27; *People v. Stout*, 4 Park. Cr. R. 71; *Dunn v. State*, 2 Ark. 229; *State v. Watkins*, 9 Conn. 47; *State v. Green*, 35 Conn. 203; *Bottomley v. U. S.*, 1 Story C. C. 135; *State v. Raymond*, 20 Iowa 582.

3. There was no surprise. *State v. Rogers*, 37 Mo. 367; *Matthews v. Allaire*, 11 N. J. L. 242; *R. R. Co. v. Vosburgh*, 45 Ill. 311; *Peers v. Davis*, 29 Mo. 184; *Boyce v. Mooney*, 40 Mo. 104; 3 Gra. & Wat. New Tr., 875, 876, 877.

HENRY, J.—The defendant was indicted for the murder of his wife, and a trial at the November term, 1878, of the St. Louis criminal court resulted in his conviction of murder of the first degree; and from the judgment he appealed to the St. Louis court of appeals, which affirmed the judgment, and he has appealed to this court.

Appellant assigns as error: *First*, The admission of illegal and incompetent testimony on the part of the State. *Second*, The failure of the court to confine the testimony complained of, by instruction, to the object for which the court admitted it, viz: to prove intent. *Third*, The failure of the court to grant a new trial on the ground of surprise. *Fourth*, The refusal of the court to grant a new trial on

account of improper conduct of the circuit attorney in his closing address to the jury. *Fifth*, The refusal of the court to give instructions asked by defendant, with respect to a reasonable doubt as to the existence of deliberation or premeditation. *Sixth*, The failure of the court to instruct the jury as to the legal effect of evidence introduced by defendant to establish his general reputation as a peaceable and quiet citizen. *Seventh*, The refusal by the court to grant defendant's motion to be discharged, for reasons in the motion assigned.

The testimony for the State proved that defendant killed his wife by shooting her with a pistol, on the 20th day of August, 1876. Elizabeth Kerr, a witness
1. CRIMINAL LAW;
 evidence of an
 other offense,
 when admissible:
 murder. for the State, heard a shot, and children screaming, and went to Nugent's house, saw Nugent with a pistol in his hand near the little porch outside his house. His daughter, about fifteen years of age, came out of the house and said: "Pa, you killed ma." He said, "I know I did, and I am glad of it, and she is gone and I am willing to go." Witness then stated that there were bruises on the person of the deceased, other than the wound inflicted by the pistol ball. Mrs. Woehler testified that she heard the shot, heard quarreling between defendant and deceased; that defendant said he wanted something to eat; and deceased said she had nothing for him; and defendant said he would shoot her; then his daughter came and screamed, "You have killed ma." He replied, "I know I did, and that is what I wanted to do." Witness heard defendant twice say he would shoot his wife, and heard the pistol shot immediately after he last said it. The testimony of Charlotte Ickeworth, Caroline Meinhold and Henry Woehler, was about the same as that of Mrs. Woehler.

The State then introduced evidence tending to show that within sixty days preceding the homicide, the defendant frequently mistreated his wife, at one time driving her from the house and shooting at her; at another striking

her with a poker; at another cutting her with a knife; also evidence of a threat that he would kill her, to all of which defendant objected, and now contends that it was inadmissible, on the ground that when the intention appears from the facts and circumstances of the transaction itself, evidence of other facts wholly disconnected with the charge for which the defendant is on trial, cannot be introduced against him. In support of this proposition he cites many cases and elementary works to show, what is not controverted, that the law infers malice from the act of killing. It does not, however, infer murder in the first degree from an intentional killing. The common law presumed from an intentional killing, murder; but under our statute establishing two degrees of murder, if nothing but the intentional killing appears, it is murder in the second degree. The defendant was indicted for murder of the first degree, and the State had the right to introduce any evidence to show that the killing was of that degree. You cannot infer the guilt of a person of a felony he is charged with from proof of his guilt of some other distinct crime, even of the same nature. But in the *People v. Stout*, 4 Park. Crim. Rep. 127, relied upon by defendant's counsel, the court remarked: "It is important not to confound the principle upon which these two classes rest; on the one hand it is admissible to produce evidence of a distinct crime to prove the *scienter*, or to make out the *res gestae*, or to exhibit a chain of circumstantial evidence of guilt in respect to the act charged; on the other hand, it is necessary strictly to limit the evidence to these exceptions, and to exclude it when it does not legitimately fall within its scope."

Another author cited by counsel for the prisoner, says: "Perhaps the following sentence expresses the doctrine in as distinct and express terms and outline as can well be employed: It is, though the prisoner is not to be prejudiced in the eyes of the jury by the needless admission of testimony to prove another crime, yet whenever the evi-

dence which tends to prove the other crime tends also to prove this one, not merely by showing the prisoner to be a bad man, but by showing the particular bad intent to have existed in his mind at the time when he did the act complained of, it is admissible; it is also admissible, if it really tends thus, as in the facts of most cases it does not, to prove the act itself." Bish. Crim. Pr., § 493.

A case cited by the court of appeals, and commented upon by counsel, (*Reg. v. Voke*, 1 R. & R. British Crown Cases 531.) was for maliciously shooting. The evidence of Pearce, prosecuting witness, was that on the 3rd day of July, he was game keeper for Lord Glastonbury for the manor of Compton, and on that day went to the manor and saw prisoner with a gun, and asked him what he was about, and told him he was doing a wrong thing, and asked him why he was doing so; that prisoner asked Pearce to pardon him, and he told the prisoner he could not, and requested him to go to the Lord's Steward with him. He consented, and the two walked together until coming near prosecutor's horse, about sixty yards distant, the prosecutor went ahead, and when a short distance from the prisoner, the latter fired at his back, but said nothing. Pearce then turned around and saw prisoner running, and attempted to pursue him, but his back seemed to be broken, and he could not pursue him. Pearce then turned back to the horse, and, after mounting, was going home and had proceeded about a half mile to a place where there was a hedge on each side of the road, when the prisoner again fired his gun from the hedge and put out one of Pearce's eyes. Between the first and second firing a quarter of an hour elapsed. The evidence of the second firing was held admissible on the ground that it seemed to be one continued transaction, and also to show that the first firing was willful, not accidental.

If admissible to show willfulness, we cannot see why not also competent, under our statute, to show deliberation, which, no less than willfulness, is one of the constituent

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elements of murder in the first degree. If what transpired when the homicide was committed, only shows murder of the second degree, upon what principle is evidence for the State tending to show the higher grade of offense with which the defendant is charged, to be excluded? If the State is to be confined to evidence of what transpired immediately in connection with the homicide, in no case could one be convicted of murder of the first degree, unless the acts directly accompanying the homicide showed the deliberation which it is necessary for the State to prove in order to convict the accused of that crime. Proof of an intentional killing, without more, would be sufficient on the defendant's theory to exclude all evidence of the previous existence of hatred and malice on the part of the accused toward the deceased, and of threats made by him against the life of the deceased, and thus place it in the power of the slayer to determine the degree of crime of which he will be convicted. He can seek an opportunity to kill when nothing can be shown but the intentional killing, and, thus secure the exclusion of all evidence of previous threats, malignity and attempts upon the life of the deceased, and defy the State to prove the murder of which he is guilty as charged.

We undertake to say that no case in England or America countenances such a doctrine. If the fact of the commission of a former crime has no tendency to prove the commission of the one for which the accused is on trial, or any essential ingredient of the latter, it is of course inadmissible for any purpose, and this is as far as any case has gone in that direction. But if the commission or attempt to commit another crime, tends to establish the commission of the crime in question, or any fact which is one of its constituent elements, it is admissible, just as any other evidence, to establish the fact, and the State cannot be deprived of such evidence, because it proves the accused guilty of another and distinct offense. 1 Bishop Crim. Procedure, §§ 491, 492. "On an indictment for murder, former at-

tempts of the defendant to assassinate the deceased are admissible in evidence." Wharton's Crim. Law, § 635. If the crime charged is established by other evidence, there is no necessity for proving such prior attempts to assassinate. But, can the court assume that any evidence has established the guilt of the accused, and exclude evidence which is legitimate to prove such guilt?

Here the question was, not only whether the accused killed the deceased intentionally, but whether he was guilty of murder of the first or of the second degree. The fact that he intentionally killed, without more, only proved him guilty of murder in the second degree, but the State, by the indictment, charged the higher degree, and had a right to introduce such evidence as was available to establish that charge. The former offenses against the wife tended to show the state of feeling of the accused toward her, and to prove that the killing was not only intentional and malicious, but also deliberate. The authorities cited by the counsel for the accused, we think sustain the action of the trial court in admitting the evidence.

The court did not err in refusing "by instruction to confine the evidence of the previous misconduct of the accused toward the deceased, to the object for which the court admitted it, viz: to prove intent." It was admissible, not only for that purpose, but generally in support of the charge of deliberate murder. It equally proved deliberation and intent.

As to the fourth alleged error, the conduct of the circuit attorney was not as circumspect as it might have been, but it was not so far out of the limits of legitimate discussion as to warrant a reversal of the judgment.

The motion for a new trial on the ground of surprise, was properly overruled. There is no law or practice in Missouri requiring the State to furnish the accused with a list of her witnesses. The names of all material witnesses must be indorsed upon the indictment, but other witnesses may be called or subpoenaed

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to testify for the State, and the only consequence of a failure to indorse their names upon the indictment, is that no continuance will be granted the State on account of the absence of such witnesses, unless upon affidavit of the prosecuting attorney showing good cause for continuance. § 1802, R. S. 1879. It cannot be a surprise to the accused, that is, a technical surprise, such as is recognized as a ground for setting aside a verdict that witnesses are introduced to prove his guilt, of whom he had not heard as witnesses. There would be no end of new trials if this were recognized as a ground for granting them. In this case, however, the defendant has no cause of complaint on that score, for his attorney was furnished with a list, by the prosecuting attorney through an officer of the court, and he declined to examine it, insisting upon some other mode or time of serving him with it. It was a matter of grace and favor, and not of duty, that the prosecuting attorney delivered it at all.

The refusal of the court to give an instruction asked by defendant with regard to the effect of a reasonable doubt

4. —: reasonable doubt. as to the existence of deliberation or premeditation, it is contended, was error. It is not the practice to separate the elements of murder and give the instruction as to reasonable doubt upon each of those constituents separately. If there is any room to doubt the principal fact, that the accused committed the homicide, it is frequently asked and given with regard to that fact alone. In its instruction the court defined the terms "deliberation" and "premeditation," and clearly informed the jury that if they had a reasonable doubt of his guilt, they should acquit the defendant. They were told what facts would constitute guilt, and that those facts must be found beyond a reasonable doubt.

He also complains that the court did not instruct the jury as to the legal effect of evidence introduced by him

5. —: Instructions. to establish his general reputation as a peaceable and quiet citizen. Defendant's counsel

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asked no instruction which was refused, but contends that the court, of its own motion, should have instructed the jury on the subject. We had occasion, at this term, in the case of the *State v. Kilgore*, 70 Mo. 546, to consider that question, and decided it adversely to the prisoner, and to that decision we adhere.

It only remains to consider whether the court should have sustained defendant's motion for a discharge under section 27, page 1105, Wagner's Statutes, which is as follows: "If any person indicted for any offense and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after such indictment found, he shall be entitled to be discharged, so far as relates to the offense for which he was committed, unless the delay shall happen upon the application of the prisoner, or shall be occasioned by the want of time to try the cause at such second term."

He was indicted at the November term, 1876, and on his application at the January, March, May and July terms, 1877, the cause was continued. At the October and November terms, 1877, and the January term, 1878, it was continued by the State, and at the March term, 1878, the defendant filed his motion for discharge under the statute, which was overruled, and the cause was again continued for the State, on account of absence of witnesses. At the May term, 1878, he renewed his motion, which was overruled, and the cause was again continued by the State. Again at the July term he renewed his motion, which was again overruled, and the court, of its own motion, continued the cause. At the October term, 1878, it was continued by consent of parties. At the November term, 1878, 14th day of December, the defendant renewed his motion for discharge, but subsequently withdrew it and again filed a similar motion on the 17th day of December, 1878, which was overruled, and at the same term he was tried and convicted. It thus appears that there were eleven continuances, four

on the application of defendant, five by the State, one by consent and one by the court of its own motion.

In *Ex parte Donaldson*, 44 Mo. 149, section 27, page 1105, Wagner's Statutes, was held not to apply to the St. Louis criminal court.

Defendant contends that under section 22 of the bill of rights, article 2, constitution of 1875, which provides that "in criminal prosecutions, the accused shall have the right to a speedy public trial," he was entitled to his discharge. It was not the intention of the framers of the constitution to confer a right to a speedy trial, without regard to the law organizing and fixing times for holding terms of our criminal courts. The evident and only practical construction of that section is, that the State shall not, when no sufficient reason exists for it, hold the prisoner in custody and harass him by imprisonment, when he might be tried and acquitted or convicted. If we had nothing but that provision of the constitution on the subject, the State might, as often as there were good and sufficient reasons, continue the cause. As we observed in *Ex parte Donaldson*, "were there no statute on the subject, the courts might have the unquestionable right to intervene, when the delay, oppression and wrong were palpable." Section 27, *supra*, was intended to prescribe a fixed rule upon the subject, and not leave the rights of the accused to be determined by the indefinite requirement of the bill of rights.

In this case the State, for four terms, was ready for trial, and the defendant, at each of those terms, applied for and obtained a continuance. Then for five consecutive terms thereafter the accused was ready, and the State, not being ready, applied for and obtained continuances. At one term the court, of its own motion, continued the cause, and at another it was by consent of parties continued. The presumption is that the continuances granted to the State, on her application, and by the court, of its own motion, were for good and sufficient reasons in the absence of any-

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thing of record to the contrary. The simple fact that there was so long a delay in bringing the cause to trial, is by no means conclusive that the accused had not as speedy a trial as under the circumstances could have been obtained, by the exercise of the utmost diligence on the part of the officers of the State.

We have thus noticed *seriatim* the several grounds which are relied upon for a reversal of this judgment, and are fully satisfied that no error was committed by the trial court in the progress of the cause, and consequently the judgment of the court of appeals, affirming that of the St. Louis criminal court, is affirmed. All concur.

RAINS, *Plaintiff in Error*, v. DUNNEGAN.

A conveyance assailed as fraudulent, *Held*, to have been made *bona fide*.

Error to Cedar Circuit Court.—HON. JNO. D. PARKINSON,
Judge.

AFFIRMED.

Johnson & Buller for appellant.

D. P. Stratten for respondent.

NAPTON, J.—This is an action to set aside a deed from the father of defendants, made in 1865, on the ground that it was made to defraud the creditors of the father. The question is one of fact, and was found by the circuit court for the defendants, and we think rightly. It seems that during the war the defendants, then young daughters of F. Dunnegan, whilst their father was absent from home, through their energy and industry, made money out of the mill and cotton-gin on the place, and hid the money in the garden, and in 1865 bought and paid \$2,500 for one-half interest

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in the place. They also supported the family, and the only ground for attacking this conveyance from the father was, that this mill and cotton-gin, by which this money was accumulated, belonged to the father. We think these young girls were entitled to great credit for their display of self-reliance and energetic industry during their father's wanderings, and instead of pronouncing their acts fraudulent, they were deserving of the highest commendation. The suit was brought in 1875, after the death of the father and marriage of one of the sisters. We cordially concur in the opinion of the circuit court in declining to set aside the deed of the father, made ten years before and duly recorded, on the ground of fraud. The other judges concur.

NOSINGER *et al.*, Appellants, v. RING.

Executory Contract of Sale: DECISION OF THIRD PARTY AS TO QUALITY OF GOODS. In the absence of fraud, the decision of one agreed upon between the parties to an executory contract of sale to determine whether the goods offered conform to the requirements of the contract, is binding.

Appeal from St. Louis Court of Appeals.

REVERSED.

John K. Cravens for appellants, cited *Gaylord Manufacturing Co. v. Allen*, 53 N. Y. 515; *Dutchess Co. v. Harding*, 49 N. Y. 321; *Stevens v. Mackay*, 40 Mo. 224; *Graff v. Foster*, 67 Mo. 512.

Jas. O. Broadhead and *Valle Reyburn* for respondent.

McCullough was but a special agent. The acts of a special agent must be strictly within the scope of his agency. *Story Agency*, (3 Ed.) § 126, p. 144; *Rossiter v. Rossiter*, 8 Wend. 494; *East India Co. v. Hensley*, 1 Esp. 111; *Pursley*

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v. Morrison, 7 Ind. 356. It is the duty of the party dealing with a special agent to ascertain and know the extent of his powers. 49 N. Y. 455; *Smith v. Tracy*, 36 N. Y. 79; *Nixon v. Palmer*, 4 Seld. 398; *Sage v. Sherman*, Lalor 149; *Beals v. Allen*, 18 Johns. 363.

HOUGH, J.—This was a suit to recover the difference between the contract price and market price at the time and place of delivery of sundry boxes of meat packed by the plaintiffs for the defendant, and delivered to him under a certain contract of sale, which meat the defendant failed and refused to accept. The defendant admitted the contract of sale and his refusal to accept the meat delivered, and alleged, as a reason for his refusal, that the meat tendered did not conform to the requirements of the contract. The contract, which was entered into on the 22nd day of August, 1872, called for 500 boxes long boneless (long clear) middles, to average not less than fifty-two pounds each middle, and 500 boxes short boneless (short clear) middles, to average not less than forty-two pounds each middle, both lots at six and three-quarter cents per net pound of meat, delivery to be made at Kansas City, Mo., on board cars, at the option of the sellers, during the month of December, 1872, and to be paid for in cash on delivery; the above meat to be cured, cut, trimmed and packed according to the requirements of the New York standard for long and short boneless (clear) middles.

On the 20th day of December, 1872, the plaintiffs notified the defendant that they were ready to begin delivering the meat under their contract. Thereupon it was arranged between the parties that the meat should be inspected before it was delivered on board the cars, and one James McCullough, a professional inspector of meat, was employed by the defendant to see that the meat offered by the plaintiff under his contract was properly cut, cured, trimmed, boxed and weighed. The plaintiffs were notified of his selection as inspector, and were directed to

ship the middles to John H. Pool, New York City, whenever they received McCullough's certificate that they were according to contract. McCullough inspected the meat, gave the required certificate to the plaintiffs, and the meat was put upon the cars. Upon receiving from McCullough a description of the meat inspected by him and shipped by the plaintiffs, the defendant, Ring, wrote the plaintiffs, declining to accept the same, for the reason that it did not come up to the requirements of the contract. The plaintiffs retained the meat and sold it, and brought this action to recover the difference between the contract price and the market price at the time and place of delivery. The plaintiffs had judgment in the circuit court, which was reversed by the court of appeals.

The facts stated appeared in evidence at the trial, and the inspector also testified that the meat was according to contract. The defendant offered to prove that the meat was not according to contract, but this testimony was rejected by the court. The cause was tried without the aid of a jury. At the instance of the plaintiffs, the court gave the following declaration of law: If the court, sitting as a jury, believe that the meat described in the contract offered in evidence and admitted in the pleadings was tendered to defendant by plaintiffs, and delivered on board the cars at Kansas City, within the time required by the contract, and that said meat, prior to said tender on said cars, had been inspected by the agent of defendant, and accepted by him, to be of the kind, quality and quantity called for in said contract; and when said meat was so tendered by plaintiffs, defendant failed and refused to receive and pay for the same, then the finding should be for the plaintiffs.

No question is made as to the measure of damages, and we therefore omit the instruction on that subject. The substance of the agreement between the parties was that the defendant would accept such meat, when delivered, as had been inspected by McCullough, and pronounced by him to conform to the requirements of the contract. There

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is no allegation, nor is there any evidence of collusion between the inspector and the plaintiffs; and, in the absence of any such collusion, the purchaser was as much bound to receive the meat as if he had inspected it in person. And there can be no question that, if Ring had himself inspected the meat and pronounced it according to contract, before it was packed and delivered, in the absence of any fraud or imposition on the part of the plaintiffs, he could not afterward have refused to accept it on the ground that it did not come up to the contract. No fraud or unfairness on the part of the plaintiffs was attempted to be shown. We think the testimony offered was properly rejected, and that the declaration of law given by the court was correct. The judgment of the court of appeals must therefore be reversed, and that of the circuit court affirmed. All concur.

BROWN V. WEATHERBY *et al.*, Plaintiffs in Error.

1. **Proceedings by Administrator de bonis non to Compel former Administrator to Account:** PRACTICE: NOTICE. It was necessary to the validity of a proceeding in the probate court instituted by an administrator *de bonis non* under section 67 of article 1 of the administration law, (1 Wag. Stat., 81,) to recover assets not accounted for by the former administrator, that he, as well as his sureties, should be notified; but if, after appeal, the administrator entered his appearance in the circuit court, that authorized the rendition of a judgment there against both him and the sureties.
2. **Administrator's Bond.** It is not essential to the validity of an administrator's bond that it shall have been approved by the probate court.
3. —: DELIVERY: ERASURE OF NAMES OF SURETIES. An administrator's bond, after being signed, was placed by the administrator in a pigeon-hole of a desk where other probate papers were kept, and at which business of a probate nature was transacted, and which was in the office of the judge of probate and under control of himself and his clerk; and, thereupon, the administrator entered upon the discharge of his duties; *Held*, that these facts sufficiently proved

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delivery and acceptance of the bond. *Held*, further, that the subsequent erasure of the names of the sureties would not release them from liability.

Error to DeKalb Circuit Court.—HON. JOS. P. GRUBB, Judge.

AFFIRMED.

S. S. Brown and J. D. Strong for defendant in error.

Bennett Pike for plaintiffs in error.

SHERWOOD, C. J.—This was a proceeding under section 67, page 81, 1 Wagner's Statutes, originating in the probate court of DeKalb county. One Weatherby, as public administrator, had formerly in his charge the estate of Hardwick. He failed, on ceasing to act in that capacity, to deliver to his successor, Brown, the assets of the estate, and the latter, therefore, issued a notice to Weatherby, and his official sureties, informing them that he, at the next term, would move for a judgment against them, for the rendition of the assets of the estate to him, the said administrator *de bonis non*. Three of the sureties were, but the former public administrator was not, served with notice. The sureties who were served appeared and made defense. The circuit court, on appeal had, found that Weatherby had in his hands unaccounted for, \$2,040.10 belonging to said estate, and gave judgment against both the former public administrator and his sureties, for that sum.

I.

The chief question in this case is, whether the court had any authority to render judgment against the sureties when their principal was not sued, and did not appear. It is among the fundamentals of the law that a personal judgment rendered without opportunity to the party sued of being heard, should not be permitted to stand. It was ex-

1. PROCEEDINGS BY
ADMINISTRATOR
DE BONIS NON TO
COMPEL FORMER
ADMINISTRATOR
TO ACCOUNT: prac-
tice: notice.

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pressly held in *Wickham v. Page*, 49 Mo. 526, that though no notice is in terms required by section 67, yet the law will of itself, and of necessity, imply that notice be given to the party against whom judgment is asked, and this ruling is in accord not only with first principles, and the case just cited, but with the earlier one of *Laughlin v. Fairbanks*, 8 Mo. 370. This point, so plain, both upon reason and authority, would scarcely seem to need elaboration. The proceeding in question is summary, and, therefore, to be strictly construed in accordance with a familiar principle.

The section being considered evidently contemplates the personal presence of the late administrator in order that he may obey the order of the court and deliver to his successor the assets of the estate. He cannot be deemed disobedient to the order of the court, unless notified that such an order will be made, and opportunity be thus afforded him to either yield obedience to that order, or else show lawful excuse why the order should not go. And the liability of the sureties is dependent upon that of their principal; if he is not liable in consequence of no assets of the estate being in his hands, or because he has already, without being so ordered, delivered such assets to his successor, then they are not liable. In order that it may be adjudicated whether he be thus liable, it is of first necessity that opportunity be given him, touching the things alleged against him. In illustration of this the case of *Caldwell v. Lockridge*, 9 Mo. 362, may be cited. There the administrator having given notice, and made final settlement, was discharged. After such discharge and in the absence of the administrator, but before the close of the term, the matter of the settlement was opened, and a different settlement was made, and held, that such settlement thus made was a nullity. This ruling evidently proceeds upon the theory that notice is a conspicuous and indispensable element of jurisdiction, and that the principle is applicable as well to administration proceedings as to any other

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whatsoever. In the case at bar, either through resignation, or else expiration of his term of office, all connection of the public administrator with the estate of Hardwick had as obviously ceased as if he had made final settlement and been discharged, as in Caldwell's case.

If Weatherby had, conformably to the provisions of section 47 of the same chapter, given notice of his intended resignation, and of making final settlement, and at such settlement, the amount of money in his hands, as public administrator, had been computed, ascertained and declared, perhaps the present proceeding against his sureties would not be objectionable, for the sureties would have been answerable for the ascertained default—a default computed while the public administrator was present and the jurisdiction of the court over him had not ceased. Here, however, the record discloses a different case—a case for which the statute has provided two remedies—one summary, to which we have been adverting—the other consisting in a suit on the bond; in which suit, by express statutory permission, one or more of the obligors might be held liable for any default or breach of the conditions of the official bond. In a word, we hold that, under the provisions of section 67, you cannot render a judgment against the sureties and their principal, when that principal has not been summoned, and when, as here, no steps were taken while the administrator remained in office, to have the amount of money in his hands judicially ascertained, and an order for its rendition made while the administrator was before the court. Perhaps service may yet be had on the former public administrator. If not, resort must be had to his bond.

II.

As to that bond, there was no necessity that it should have been approved in order to its validity.

2: ADMINISTRATOR'S BOND.

State v. Farmer, 54 Mo. 439, and cases cited.

And, in reference to its delivery, the evidence shows that it, after being signed, was placed by the principal

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3. ——— : delivery: therein in a pigeon-hole of the desk, where
erasure of names
of sureties. other probate papers were kept, and at which
business of a probate nature was done. This desk was in
the office of the judge of probate, and under his control
and that of his clerk. These facts, taken in connection
with the one that, after filing the bond, Weatherby entered
on the discharge of his duties as public administrator, suf-
ficiently establish the delivery and acceptance of the bond.
Of course, after the bond was thus delivered, it was entirely
out of the power of Weatherby, or, indeed, any one else,
to release the bondsmen by merely erasing their names
from the bond. For the error committed in entering judg-
ment, as above indicated, the judgment will be reversed
and the cause remanded. All concur.

On Rehearing.

SHERWOOD, C. J.—Our former opinion as to the chief point involved in this case was based upon the failure to serve Weatherby, the first administrator, with notice. Since delivering that opinion, however, our attention has been called to the overlooked fact that, though Weatherby was not served with notice, and did not appear in the probate court, yet that the record shows his appearance in the circuit court when the case went there on appeal, for trial *de novo*. This recital of the record, which must be regarded as true, obviates any objections heretofore taken because of non-service of notice on the administrator, or of his non-appearance in the probate court, and results in the affirmance of the judgment. All concur.

FOSTER, *Appellant*, v. THE CITY OF ST. LOUIS.

Municipal Corporation: LIABILITY FOR FLOODING PROPERTY BY CONSTRUCTION OF A STREET. A city is liable in damages for the flooding of private property caused by the construction of a street in pursuance of a plan prescribed by ordinance, only when the injury is the result of negligent execution of the plan, not when it is the result of a defect in the plan itself.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

David Murphy for appellant.

Leverett Bell for respondent.

NORTON, J.—This is a suit for the recovery of damages to lots 13 and 14, block 4, Larned's addition to the city of St. Louis, alleged to have been occasioned by defendant in opening and constructing Argyle Avenue, a certain street of said city north of and in prolongation of the east and west lines of plaintiff's lots, to the center of said block, and up to and against the north line of said lots, in so careless, negligent and improper manner that by reason thereof great quantities of water flowing from the surface, the entire length of said avenue, into the gutter thereof, were precipitated into and ran over the lots of plaintiff, filling privy-vault, cistern, &c., and rendering the premises uninhabitable; to the damage of plaintiff in the sum of \$2,000. Defendant in her answer denied specifically the allegations of the petition. On the trial and at the close of plaintiff's evidence the court sustained a demurrer to the evidence, whereupon plaintiff took a non-suit, and judgment was rendered for defendant, which on appeal to the St. Louis court of appeals was affirmed, and from which plaintiff has appealed to this court.

The evidence offered on the trial tended to show that the street known as Argyle avenue was opened according

Foster v. The City of St. Louis.

to a plan which follows the grade established by an ordinance of the city; that in said plan no method was devised for the disposition of the surface water which might flow along and into the gutters of said street, so that adjoining proprietors would not be injured thereby. It also not only tended to show, but conclusively established the fact, that the work of grading and opening the said street in accordance with the plan was well and carefully, and not negligently done, and that the injury to plaintiff's lots was not occasioned by any careless or negligent execution of the work in grading and opening the said street which the ordinance authorized, but resulted from an error of judgment on the part of the city council, in ordering the opening of the street at a certain grade without providing in the plan and specifications for doing the work, some method of drainage for the disposition of the surface water.

The passage of the ordinance establishing the grade of said street, directing it to be opened according to a plan and specifications was *quasi* judicial, and that the city is not liable for consequential damages arising from a defect in the plan adopted, but can only be held liable for damages resulting from negligent execution of the work done in compliance with such plan, is fully established by the following cases: *Imler v. City of Springfield*, 55 Mo. 119; *Schattner v. City of Kansas*, 53 Mo. 162; *Saxton v. City of St. Joseph*, 60 Mo. 153; *Wegmann v. City of Jefferson*, 61 Mo. 55. These authorities fully justified the trial court in sustaining the demurrer to plaintiff's evidence, and entering up judgment for defendant. Judgment affirmed, in which all concur.

CITY OF KANSAS, *Appellant*, v. PAYNE.

Kansas City: COLLECTION OF CITY TAXES: CONSTITUTIONAL LAW: TITLE OF ACT. The act of 1879 providing for the collection of delinquent taxes, (Acts 1879, p. 186,) cannot, without disregarding section 28, article 4, constitution of 1875, be construed as amending or repealing those provisions of the charter of Kansas City of 1875, which relate to the collection of city taxes. (Acts 1875, pp. 225, &c.) There is nothing in the title to indicate that the act relates to the subject of city taxes, or has any reference to the charter of Kansas City. It follows, that that city has the right to collect her taxes and enforce the liens for them as provided by the charter, and that she is entitled to collect interest at the rate fixed by the charter.

Appeal from Jackson Circuit Court.—HON. S. H. WOODSON,
Judge.

REVERSED.

T. A. Gill and Field & Small for appellant.

F. M. Black for respondent.

HENRY, J.—This was a suit by the city of Kansas for the collection of city taxes from 1866 to 1878 inclusive. The plaintiff claimed that interest should be added to the tax assessed, at the rate of twenty-four per cent per annum, as provided by the charter, and the defendant, that interest should be allowed pursuant to the act of the General Assembly relative to delinquent taxes, approved April 24th, 1879.

Unless otherwise expressly provided by its charter, no city or town had a lien for taxes on real property until the passage of that act. By the acts of 1872 and 1877, it was provided that real property should in all cases be liable for all taxes due any city, or incorporated town, or school district, and a lien was thereby created in favor of the State of Missouri for all such taxes, enforceable as in those acts provided. Sess. Acts 1872, p. 119; Sess. Acts 1877, p. 384. The city or town had no remedy to enforce the collection

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of taxes delinquent on real estate, unless expressly given by the charter. The lien for the taxes was reserved to the State, which had complete control over it, and had exercised that control by making delinquent taxes due to towns and cities collectible by the State collectors, and, when suit was necessary, by suit in the name of the State.

By the charter of the city of Kansas, approved March 24th, 1875, section 25, article 6, "The lien on real property heretofore created in favor of the State of Missouri, for all such taxes and special assessments levied by the city, and all right, title and estate acquired by or vested in the State of Missouri by reason of the forfeiture or sale to the State of any tract of land, town or city lot offered at public sale for the taxes or special assessments levied by said city, interest and costs due thereon, and not sold for want of bidders, are hereby transferred and assigned to the city of Kansas; and all lands, town or city lots, forfeited or sold to the State of Missouri on account of taxes or special assessments levied thereon by the city of Kansas, shall, from the taking effect of this act, be deemed and taken to be forfeited and sold to the City of Kansas. In all cases where certificates of purchase have been made out in the names of purchasers, at any sale for such delinquent taxes or special assessments, the right to redeem from any such sale, or to a deed or deeds, shall not be affected or impaired by anything in this act contained." Sess. Acts 1875, p. 225. By section 76, article 6, (lb. 241,) she had ample means for the collection of delinquent taxes on real property by the sale of the property, or by suit in her own name. Thus the law stood when the act of 1879 was passed. It is entitled "An act to amend sections 2, 3, 4, 5, 9, 11, 14, 17 and 18 of an act approved April 12th, 1877, entitled 'An act to provide for the collection of delinquent taxes due the State, and repealing section 184 of an act concerning the assessment and collection of the revenue,'" approved March 30th, 1872. The act of 1872 applied to Kansas City, for at that time she had no lien on real estate for taxes assessed

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against it; and for her delinquent taxes a lien was created and reserved to the State, and they were collected by the county collector; but, by the charter, as amended in 1875, a lien was expressly given to the city, and by section 24, article 6, it was provided that the collector of Jackson county should not thereafter collect any taxes or special assessments theretofore or thereafter levied by said city, but that they should be collected by the city through its own officers. After the passage of that act, sections 178, 179, 180, 181, 182 and 184 of the act of 1872 ceased to be applicable to the City of Kansas, and neither, consequently, were corresponding sections of the act of 1877 applicable to the city taxes of Kansas City.

The provisions of the act of 1879 apply equally to State and city or town taxes. The inclusion of those towns and cities which had no lien on real estate for taxes, nor any remedy to enforce the payment of delinquent taxes, was germane to the title of the act, because for such taxes the State had a lien and collected them by her officers and by suits in her name. But there is nothing whatever in the title of the act of 1879 to apprise any one of a purpose to legislate in regard to the taxes of cities or towns having a lien for their taxes and a remedy to enforce it. Such taxes are not State taxes in any sense, while delinquent taxes due other cities and towns for which a lien was created and reserved to the State, and which were, after they became delinquent, collectible only by the State, were State taxes. Such cities and towns had no remedy to enforce the lien, and the whole subject was by statute under the control of the State. It is conceded that the remedy provided in the charter of the city, by suit in the name of the city, for the collection of delinquent taxes, remains undisturbed by the act of 1879, and this suit was under the charter, and not under that act.

If constitutional, the act of 1879 repeals important provisions of the charter of the city, with respect to the collection of her revenue, while nothing in the title of the

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act indicates any such purpose. It purports to be an act in relation to State taxes. The subject of the collection of taxes imposed by a city which had a right, and a remedy, to collect them by suit, in its own name is not embraced in the phrase "State taxes." It is another and a different subject, and it is doubtful if the two could be included in the same act. "No bill * * shall contain more than one subject, which shall be clearly expressed in its title." Section 28, article 4, constitution of 1875. Similar provisions are to be found in the constitutions of other States, and we will but cite a few cases in which they have been construed, which we think fully sustain the position of the counsel for the city on the subject. *Ryerson v. Utley*, 16 Mich. 269; *Igoe v. The State*, 14 Ind. 239; *Failing v. Commissioners*, 53 Barb. 70. In the latter case the title of the act was "An act to regulate a road in the town of Palatine in the county of Montgomery." The words in the enactment were "to alter and reduce the width." Potter, J. observed: "The body of the bill expresses its object. The title of the bill disguises and conceals it. No person from reading its title would ever guess at its object." The object of the constitutional provision was to require so clear an expression of the subject of the bill in the title, that it would at once apprise legislators and others interested of the precise subject of the proposed legislation. "The constitution (says Judge Cooley) has made the title the conclusive index to the legislative intent. It is no answer to say that the title might have been more comprehensive if, in fact, the legislature has not seen fit to so make it."

Who would have supposed from the title of the act in question, that important provisions of the charter of the City of Kansas would be repealed or amended? No intention is declared to repeal any law, except section 184 of the act of 1872, or to amend any law, except the sections of the act of 1877 therein named, neither of which had any application to the City of Kansas. If the two subjects

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city taxes and State taxes, are not so distinct, but that they both may be included in one act, still, in the language of Judge Cooley: "The constitution has made the title the conclusive index to the legislative intent. It is no answer to say that the title might have been made more comprehensive." We are, therefore, of the opinion, that the City of Kansas has the right to collect her taxes and enforce the liens for them as provided by her charter, and that the rate of interest fixed by the charter is that to which she is entitled, and that the act of 1879, so far as applicable to said city, is in conflict with the constitution of 1875, and therefore, to that extent of no force, or validity. Consequently the judgment of the circuit court is reversed and the cause remanded. All concur.

BURNES V. THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY, *Appellant*.

An Order of Court held not Res Adjudicata. A court of bankruptcy ordered the assignee of a railroad company, which had appropriated plaintiff's land to its own use, to pay him \$200 for his damages upon receiving from him a deed to the land. Plaintiff was a party to the bankruptcy proceedings, but he declined to take the money or make the deed. In an action by him against one claiming under the company to recover for the land; *Held*, that the order of the bankruptcy court was no judgment and no bar to his recovery.

Appeal from Clinton Circuit Court.—HON. GEO. W. DUNN, Judge.

AFFIRMED.

C. F. Garner, Sr., for appellant.

Ingles & Merryman for respondent.

Rains v. The St. Louis, Iron Mountain & Southern Railway Company.

NAPTON, J.—The plaintiff in this case filed a petition originally against the St. Louis & St. Joseph Railroad Company, alleging their possession of a hundred feet of his ground, and charging \$3,000 for his damages, &c. An amended petition was filed against the present defendant. To this a demurrer was filed, but the demurrer was overruled and an answer filed, and the case was tried on the amended petition and answer. The only point made here is, that in a proceeding in bankruptcy in the district court of the United States, in which Burnes was a party, an order was made that the assignee in bankruptcy pay to him \$200 for his damages by the appropriation of his ground by the St. Louis & St. Joseph Railroad Company, upon his making a deed to the company. Burnes refused to take the money or to make the deed. Passing by the question as to the jurisdiction of the court, we do not consider the order in the case as a judgment. Burnes declined to receive the money. The judgment in this case is, that he is entitled to \$500, and he is ordered to make a deed to defendant, and he has done so; and also relinquished to defendant his claim for the \$200 allowed him in the district court. Judgment affirmed. All concur except NORTON, J., who did not sit.

RAINS V. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *Appellant*.

1. **Negligence:** CONTRIBUTORY NEGLIGENCE. It is settled law in this State that although the defendant may have been guilty of negligence contributing to produce the injury complained of, still if plaintiff was also guilty of negligence proximately contributing thereto, defendant is not liable unless his negligent act occurred after he became aware of the danger to which the plaintiff, by his own neglect, had exposed himself. Hence, where the defendant's neglect consisted in the erection and maintenance of a dangerous structure obvious to the senses long before the accident; *Held*, that

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he was not liable, whether the structure could have been differently built or not. (Following *Nelson v. A. & P. R. R.*, 68 Mo. 593, and other cases.)

2. **Master and Servant: VICE-PRINCIPAL.** To constitute a servant of a railroad company the vice-principal, so as to hold the company liable for his negligence toward another servant, it is not sufficient to show that the duties of the former were to direct and control assistant brakemen in the service of the company at a particular yard, and that the latter was one of the assistant brakemen at that yard. (Following *Gowan v. St. Louis & Iron Mountain R. R.*, 61 Mo. 528; *Marshall v. Scaricker*, 63 Mo. 308.)
3. ———: **NEGLIGENCE: PERSONAL INJURIES.** If a brakeman knows that a foot bridge over the railroad upon which he is employed, is too low to permit a man standing erect on the top of a freight car to pass under it in safety, and, nevertheless, remains in the service of the company, and while passing under the bridge on the top of a freight car stands erect and is killed by coming in contact with the bridge, the company is not liable.
4. **Damages: "CIRCUMSTANCES OF MITIGATION OR AGGRAVATION."** What circumstances will mitigate or aggravate a wrong done, is a question of law. Hence, in cases arising under the 3rd section of the damage act, (R. S. 1879, § 2123,) if any such circumstances exist they should be pointed out by proper instructions, and the jury should be restricted to a consideration of those so designated.
5. **Measure of Damages: "NECESSARY INJURY."** The "necessary injury" resulting to a parent from the negligent killing of his minor child within the meaning of the 3rd section of the damage act, (R. S. 1879, § 2123,) consists in the loss of services of the deceased during minority, the cost of nursing, surgical and medical attendance and appropriate funeral expenses.

Appeal from Bollinger Circuit Court.—HON. J. B. ROBINSON, Judge.

REVERSED.

The eleventh instruction given for plaintiff authorized the jury to treat the acts and negligence of one William Madge toward deceased as the acts and negligence of defendant, and to hold the defendant liable accordingly, provided they should find that said Madge, at the time of the accident, which occasioned this suit, "was acting for and in the employ of defendant in the yard at Belmont, and that his duties were to direct and control assistant brakemen

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in said yard in the employ of the defendant, and that the deceased was, at and prior to his death, one of such."

Wm. R. Donaldson for appellant.

B. B. Cahoon for respondent.

HOUGH, J.—This was a suit under the third section of the Damage Act, to recover damages for the death of the plaintiff's minor son, who was killed at the town of Belmont, on a side track of the defendant's road, by coming in contact with a foot bridge extending across said side track from the upper story of an elevator on the east side thereof to the upper story of a freight house on the west side thereof.

This bridge was not high enough to permit persons of ordinary height to pass safely under it, while standing erect on the top of the box cars of a freight train. For about one month before the deceased was killed, he had passed under the bridge in question at least three times daily, while rendering service as brakeman on the freight trains of defendant. At the time he was killed, he was on the top of a freight train, with his back to the bridge and the engine, running or walking rapidly toward the rear end of the train, while it was passing under the bridge, and as he did not move as rapidly in the direction he was going as the train was moving in the opposite direction, he was borne backward against the bridge, which struck him in the head and killed him. There was testimony tending to show that the deceased was not in his proper position on the train, and that he was warned of the danger he was in immediately before he came in contact with the bridge. The deceased was twenty years and six months old when killed. The jury rendered a verdict for the plaintiff for \$2,000, and the defendant has appealed.

Among other instructions given for the plaintiff, was the following: "Although William Rains may have failed

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1. NEGLIGENCE: to exercise ordinary care and prudence at the time he was killed, and may have been guilty of negligence or carelessness which contributed to the injury complained of, yet, if the defendant might, by differently erecting or maintaining the bridge spoken of by the witnesses, or by the exercise of ordinary care and caution, have avoided the injury, the jury will find for the plaintiff." This instruction is not the law. The cases cited by the plaintiff, in which instructions similarly worded received the qualified approval of this court, were wholly unlike the present. They were not cases in which the acts of the defendant occasioning the injury consisted in the erection of insufficient or dangerous structures, obvious to the senses long before the accident, and therefore long before the concurring negligence of the plaintiff, but they were cases in which negligent acts of the defendant, contributing to produce the injury, occurred after the contributory negligence of the plaintiff, and without which the plaintiff would not have been injured, notwithstanding his own want of reasonable and ordinary care. And, in a case of the latter class, an instruction like the one under consideration was condemned. *Maher v. A. & P. R. R.*, 64 Mo. 276. It is the settled law of this State that, although the defendant may have been guilty of negligence contributing to produce the injury complained of, still, if the plaintiff was also guilty of negligence proximately contributing thereto, he cannot recover, unless the negligent acts of the defendant occasioning the injury, occurred after he became aware of the danger to which the plaintiff, by his own negligence, had exposed himself. *Karle v. K. C., St. J. & C. B. R. R.*, 55 Mo. 484; *Isabel v. Han. & St. Jo. R. R.*, 60 Mo. 482; *Maher v. A. & P. R. R.*, 64 Mo. 276; *Nelson v. A. & P. R. R.*, 68 Mo. 593. The instruction under consideration, which, in effect, told the jury that the plaintiff was entitled to recover, if the defendant could have so constructed the bridge as to have prevented the injury complained of, even though the deceased failed to exercise ordinary care and prudence at the

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time he was killed, and was thereby guilty of negligence contributing to his death, is in direct conflict with the foregoing authorities, and, indeed, with all the authorities everywhere on this subject. We cannot say that an instruction so fundamentally wrong was not calculated to mislead the jury in a case like the present, no matter how correctly the law may have been declared in other instructions. Instructions B and C, given by the court of its own motion, contain the same error, and are, therefore, in conflict with the views here expressed.

We do not think the facts stated in instruction numbered 11, given for the plaintiff, constituted Madge a
2. MASTER AND
SERVANT: vice-
principal. vice-principal of the defendant, and that instruction was, therefore, wrong. We have heretofore announced the law on this subject in *McGowan v. St. L. & I. Mt. R. R.*, 61 Mo. 528, and *Marsha'l v. Schricker*, 63 Mo. 308.

Instructions numbered 6 and 11 asked by the defendant should have been given. They are as follows: 6.

3. —: negli-
gence: personal
injuries. "If the deceased knew of the exposure to danger in serving as brakeman for the defendant upon a train having to pass a foot-bridge insufficiently high to permit him to pass under it while standing at full height on the top of a box-car, and with such knowledge consented to and did continue in the service of defendant as such brakeman, and was thereafter killed by coming in contact with said foot-bridge, then the plaintiff cannot recover from the defendant for any negligence in the construction of the said foot-bridge."

11. "If the deceased, while in the discharge of his duty as brakeman, passed under the foot-bridge in question frequently for the space of two or three weeks, and knew the danger of coming in contact with the top of said foot-bridge, and his attention had been called to the danger of injury from the lowness of the foot-bridge, and with this knowledge he stood or walked erect on the top of the box-car, and while so standing or walking erect there, was in

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passing, struck by the foot-bridge and killed, then the jury are instructed that this was contributory negligence on the part of the deceased and that plaintiff cannot recover." These instructions are precisely like two instructions which received the approval of this court in *Devitt v. P. R. R.*, 50 Mo. 302, the facts in which case very closely resemble the controlling facts in the case at bar.

As this case is to be remanded for another trial it may be proper to make some observations as to the measure of damages. In cases arising under the third section of the damage act, the jury should not be left to grope their way unaided through the testimony to find the circumstances of mitigation, or aggravation, which the statute authorizes them to take into consideration in making up their verdict. What circumstances will mitigate or aggravate a wrong done, is a question of law, and if any such circumstances exist, they should be pointed out by the court, and the jury should be restricted to a consideration only of those so designated.

In actions by a parent for the death of a minor child, we are of opinion that in estimating the damages, the jury may properly consider, in addition to the circumstances of mitigation or aggravation before mentioned, the loss of services of the deceased during his minority, the cost of nursing, surgical and medical attendance, and appropriate funeral expenses. These constitute "the necessary injury resulting from such death," to which the plaintiff is restricted by the statute. *Porter v. H. & St. Jo. R. R.*, ante p. 66. The judgment will be reversed and the cause remanded. All concur.

4. DAMAGES: "circumstances of mitigation or aggravation."

5. MEASURE OF DAMAGES: "necessary injury."

The State *ex rel.* Partridge v. Lewis.

THE STATE *ex rel.* PARTRIDGE V. LEWIS.

1. **St. Louis Court of Appeals:** TIME FOR TAKING APPEAL AND GIVING APPEAL BOND. The St. Louis court of appeals has no power to allow an appeal to the Supreme Court after the lapse of fifteen days from the rendition of the judgment complained of; but may approve an appeal bond and order a supersedeas at any time during the term at which the judgment is rendered. R. S. 1879, §§ 3712, 3713.
2. ———: ———: MANDAMUS. The fact that that term has expired before the Supreme Court can decide an application to compel the court of appeal to entertain a motion for such approval and supersedeas, will not prevent the issuing of a writ of mandamus requiring the court of appeals to entertain the motion, when it appears that the motion was made in time and was refused.

Original Mandamus.

PEREMPTORY WRIT AWARDED.

This was an application for a mandamus against Judges Lewis, Bakewell and Hayden, the judges of the St. Louis court of appeals, to compel them to entertain an application made to that court for the approval of an appeal bond, and, if the bond should be found sufficient, the granting of a supersedeas. The relator had already applied for, and the court had allowed, an appeal to the Supreme Court. When the application for the approval of the bond was made, they decided that an appeal having been granted, the court of appeals had no further jurisdiction of the case, and therefore could not entertain the application, although it was made within fifteen days after the rendition of the judgment and during the same term.

Jas. O. Broadhead and John P. Ellis for relator.

Geo. Denison and E. T. Allen for respondents.

SHERWOOD, C. J.—The statutory provisions regarding appeals to this court, so far as necessary to be quoted, are

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that: "No such appeal shall be allowed, unless: First, it be made during the term at which the judgment or decision appealed from was rendered; and second, the appellant or his agent shall, during the same term, file in the court his affidavit, stating, &c.; and third, all appeals from the St. Louis court of appeals shall be taken within fifteen days after the day upon which judgment was rendered," &c. R. S. 1879, § 3712. "Upon the appeal being made, the court from which an appeal is prayed shall make an order allowing the appeal; and such allowance thereof shall stay the execution in the following cases, and no others: * * * Second. When the appellant, or some responsible person for him, together with two sufficient securities, to be approved by the court, shall, during the term at which the judgment appealed from was rendered, enter into a recognizance to the adverse party," &c. *Ib.*, § 3713. It is thus clearly apparent from the above sections that the Legislature has seen fit to make a distinction between the St. Louis court of appeals and other inferior courts, requiring that appeals be taken "during the term," when taken from the judgments of the latter, but "within fifteen days" when taken from the judgments of the former. It is also equally apparent that our law-makers have made no distinction between those courts as to when the bond designed to operate as a supersedeas shall be filed, provision being made in each instance, and with regard to all courts, that the recognizance may be entered into "during the term" at which the judgment appealed from is rendered.

We cannot entertain the idea that the Legislature intended to convey any other meaning than that which their language so clearly expresses. So far as we are informed, it has been the constant practice in the country circuits to take an appeal soon after the motion for a new trial is overruled, and then to file the bond at any time during the term; and this practice was thought to fall within the purview of the statute; and no thought was entertained that the trial court had lost its jurisdiction to take a bond, be-

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cause, prior to that time, it had granted an appeal. And a reason for the adoption of such a practice is quite obvious. An affidavit for an appeal is easily prepared and filed, while the obtaining of the requisite sureties for the appeal bond requires more time and trouble. But, whatever may have been the correctness of the practice in the circuit courts just mentioned, or the soundness of the reasons to be urged in its favor, it is a sufficient answer to any objections which may be urged against the position of the relator and against the statutory provisions above quoted, on which he relies, that the law is so written; that the law allows only fifteen days in which to take an appeal from the court of appeals, but allows the appellant party the whole term during which to give bond. The construction contended for in the brief filed for respondents emasculates the statute, overthrows the expressed will of the Legislature, shortens the statutory time for giving bond, and denies the jurisdiction to take that bond after the lapse of fifteen days, a jurisdiction which that statute directly confers. We are of opinion, therefore, that the court of appeals had full power and authority to take a recognizance, when applied to for that purpose, whether the fifteen days had elapsed or not.

We are of the opinion, also, that it is a matter of no importance that the term has now passed during which the judgment of the court of appeals was rendered. An incident of this sort by no means divests the power of this court to afford that measure of relief which is applied for in the present instance. We, therefore, shall award a peremptory writ. All concur.

The State v. Redemeier.

THE STATE V. REDEMEIER, *Appellant*.

1. **Criminal Law:** INSANITY AS A DEFENSE: BURDEN OF PROOF: QUANTUM OF PROOF. The burden of proving insanity as a defense to a charge of crime, rests upon the defendant. To make out the defense it is necessary to produce evidence which will reasonably satisfy the jury of the fact. HENRY, J., dissenting as to the *quantum* of evidence.
2. **Practice:** NEW TRIAL. A new trial will not be granted on account of newly discovered evidence which is merely cumulative.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

A. N. Merrick for appellant.

J. L. Smith, Attorney-General, for the State.

NORTON, J.—The defendant was indicted at the July term, 1878, of the St. Louis criminal court for murder in the first degree, for killing one Franz Vosz. The cause was tried at the November term, 1878, of said court, and defendant was found guilty and sentenced to be hanged. An appeal was taken to the St. Louis court of appeals, where the judgment of the criminal court was affirmed, and from which defendant has appealed to this court. The fact that deceased was killed by the defendant in the most brutal manner, without cause or excuse, is not disputed, but it is claimed that no criminality attaches to defendant because it is alleged that he was insane at the time the homicide was committed. The insanity of defendant was the only defense relied upon in the trial court, and a reversal of the judgment is sought mainly upon alleged error committed by the court in its charge given to the jury, and in refusing to give the declarations of law asked by defendant.

The charge complained of is as follows: "As a defense to this prosecution, the defendant by his counsel has interposed the plea of insanity. He says, that the act

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which he is alleged to have committed is not an act for which he can be held criminally responsible, in other words, that the act was and is excusable in law, because at the time of its commission, as charged, he was insane.

The term insanity, as used in this defense, means such a perverted and deranged condition of the mental and moral faculties as renders a person incapable of distinguishing between right and wrong, and makes him unconscious at times of the nature of the act he is about to commit. Such insanity, if proved to the reasonable satisfaction of the jury to have existed at the time of the commission of the act, is in law an excuse for it, however brutal or atrocious it may have been.

The law presumes every person to be of sound mind until the contrary is shown, and when, as in this case, insanity is interposed as a defense, the fact of the existence of such insanity at the time of the commission of the offense charged must be established by the evidence to the reasonable satisfaction of the jury, and the burden of proving this fact rests with the defendant.

The opinions on questions of insanity which have been given by the medical experts are testimony before you, and are subject to the same rules of credit or discredit as the testimony of other witnesses. The opinions neither establish nor tend to establish the truth of the facts upon which they are based. Whether the matter testified to by the witnesses in the cause, as facts, are true or false, is to be determined by the jury alone. Neither are the hypothetical questions put to the medical experts by the counsel in the cause, evidence of the truth of the matters stated in these questions.

Although the jury may believe and find from the evidence that the defendant did commit the act charged against him, yet, if they further find that, at the time he did so, he was in such an insane condition of mind that he could not distinguish between right and wrong, then such act was not malicious, and the jury should acquit him of

the crime charged, on the ground of insanity, and so say in their verdict.

To establish his insanity, positive or direct testimony is not required. Circumstantial evidence which reasonably satisfies the minds of the jury that the defendant was, at the time the alleged shooting was done, incapable of distinguishing between right and wrong, or of comprehending the nature of the act, will be sufficient.

The jury are the sole and exclusive judges of the degree of credit which shall be given to the testimony in the case, and have the right to receive and credit as true, or to reject and discredit as untrue, the whole or any part of the testimony of any witness in the case. If, after the jury have carefully taken into account and considered all the evidence in the case, there remains in their minds a reasonable doubt of the guilt of the defendant, the law, in its humanity, gives to him the benefit of that doubt, and they should acquit. But, to authorize an acquittal on the ground of doubt alone, such doubt should be reasonable and substantial, and not a mere guess or conjecture of his "probable innocence."

The objections urged to the above charge are that it does not properly define insanity, and that the rule as to the burden of proof when the defense is insanity, and the degree of proof sufficient to authorize a jury to find insanity, are not correctly stated. Testing these objections by repeated decisions of this court, it will be found that they are not well taken. These decisions, we think, clearly establish that the law presumes every person who has reached the years of discretion to be of sound mind and capable of committing crime, and that such a person, charged with the commission of crime, before he can escape the penalty affixed thereto, under the plea of insanity, must rebut such presumption by evidence which reasonably satisfies the jury that he was insane at the time the act was committed, or that his mind was so diseased as to render him incapable of distinguishing between right and wrong in respect to

the act for which he is sought to be made criminally responsible; that the question of insanity is one of fact to be determined by the jury, and that, when the unlawful killing is proved by the State or admitted by the accused, the State may rest upon the legal presumption of the sanity of the accused till he shows the contrary; that the burden of proving insanity rests upon the party setting it up, and that, to discharge himself of this burden, it is not necessary to introduce evidence which establishes, beyond a reasonable doubt, his insanity, but only sufficient to reasonably satisfy the jury that it existed at the time the offense was committed; that, if the preponderance of the evidence offered establishes insanity, it is sufficient. *Baldwin v. State*, 12 Mo. 223; *State v. Huting*, 21 Mo. 464; *State v. McCoy*, 34 Mo. 531; *State v. Klinger*, 43 Mo. 127; *State v. Hundley*, 46 Mo. 414; *State v. Smith*, 53 Mo. 267; *State v. Holme*, 54 Mo. 153; *State v. Simms*, 68 Mo. 305. In the case of the *State v. McCoy*, *supra*, it was held "that it is incumbent on the State to prove every fact necessary to establish the crime of murder, which necessarily includes the sanity of the prisoner; but the burden of proving such sanity of the prisoner is fully met by the presumption of law that every person is of sound mind until the contrary appears; and he who undertakes to escape the penalty of the law by means of the plea of insanity must rebut such presumption by proof entirely satisfactory to the jury. It is a defense to be made out by the prisoner, and by proof that will satisfy the jury that he was incapable of distinguishing between right and wrong." The instructions of the court as to the burden of proof of insanity and the *quantum* of evidence to establish it are justified, not only by the case last cited, but by all the cases hereinbefore cited.

It is also insisted that the capacity of defendant to distinguish between right and wrong was the only test laid down by the court in its charge for the guidance of the jury in determining the question of insanity, and that, for this reason, it is erroneous. If the charge means that, and

nothing more, the court would have been authorized to give it under the authority of the case last cited, and 2 Greenleaf Ev., § 373; *Rex v. McNaghten*, 10 Cl. & Fin. 200; *Rex v. Offord*, 5 Carr. & P. 168; *Commonwealth v. Mosler*, 4 Barr 267; *Freeman v. People*, 4 Denio 9. But we think the construction placed by counsel on the instruction is too narrow, and that the capacity of defendant to distinguish between right and wrong was not the sole and only test by which the jury were to be governed in determining the criminal responsibility of defendant, because they were expressly told that, if defendant was incapable of comprehending, or was unconscious of the nature of the act at the time he committed it, they would acquit.

It is also earnestly and ably argued by counsel that the rule as to the degree of evidence necessary to establish insanity, as adopted in this State, should be modified and made to conform to the rule laid down in the case of *State v. Crawford*, 11 Kas. 32, and other cases in Illinois, Indiana and New Hampshire, of which the case of *State v. Crawford*, is a type. The rule approved in that case is that, whenever the defense offers evidence which raises a reasonable doubt as to the insanity of the accused, that is sufficient to rebut the presumption of sanity and to authorize an acquittal.

As to the degree of evidence which the accused is required to offer to establish the fact of insanity, the authorities are so conflicting as to be irreconcilable. It is held by some courts of the highest authority, both in this country and England, that insanity, when set up as an excuse for the crime charged, should be established by evidence sufficient to satisfy the minds of the triers of the fact beyond a reasonable doubt, that it existed at the time the act was committed. The conclusion reached in this class of cases is based upon the theory that, in every criminal case, two presumptions of law are indulged—one in favor of the person charged, that he is innocent of the charge—the other in favor of the public, that the accused, if of the years of dis-

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cretion, is of sound mind and capable of committing crime, and that, as the presumption of innocence protects the accused till the State, by evidence, establishes his guilt beyond a reasonable doubt, so the presumption that he was sane when the act was committed, protects society till it is overthrown by a like degree of evidence offered in support of the plea of insanity.

While some courts have gone to this extreme, others of high authority have gone to the other extreme of holding that, to support the plea of insanity, it is only necessary that the evidence offered should be sufficient to raise a doubt as to the insanity of the accused. Other courts, equally authoritative and much greater in number acting on the principle that *in medio tutissimus est*, have adopted a rule lying between these two extremes, holding that the defense of insanity is established when the evidence offered in support of it preponderates in favor of the fact, and reasonably satisfies the jury that it existed at the time the criminal act charged was committed. The rule last referred to has been the established law of this State since the case of *Baldwin v. State*, *supra*, was decided, and believing that it is sustained not only by reason, but by the weight of authority, both in this country and England, we are unwilling to make a departure from it. The fact that insanity is so easily simulated demonstrates the wisdom of the rule and affords a strong reason why we should adhere to it, and decline to adopt the rule contended for by defendant's counsel, the tendency of which, in my judgment, would be to stimulate, rather than repress, homicidal mania. It follows from what has been said that the charge given to the jury on behalf of the State is not subject to the objections urged against it, and it also follows that the court properly refused the instructions of defendant, which asked the court to lay down a rule for the guidance of the jury in determining the question of insanity at variance with the rule above announced as settled in this State. The instructions asked by defendant in regard to the test to be applied in

determining the insanity of defendant having been already substantially given, were for that reason properly refused.

It is also urged that the judgment should be reversed because the verdict of the jury was against the evidence, and because the preponderance of the evidence established the insanity of defendant. The claim that such preponderance existed is based upon the facts that the evidence did not disclose an adequate motive for the commission of the homicide; that deceased was killed in a public street in the presence of several witnesses; that defendant was indifferent to the consequences of his crime and made no effort to escape, and previous to the homicide would frequently sit for an hour or more at a time without engaging in conversation. While the absence of motive may be considered, in connection with the other facts, in reaching a conclusion as to whether defendant was or was not insane, it by no means follows from the mere fact that the evidence offered fell short of discovering a motive, that a motive did not in fact exist, locked up in the breast of the accused. That defendant was operated upon by some motive in killing deceased may be deduced from the circumstances in evidence, that about two years before the homicide, deceased went into a saloon where several persons were present, defendant being one of the number, and invited all but the defendant to drink with him, at which defendant took umbrage and had some "words" with the deceased. That this slight or insult took root in the breast of defendant is evident by the statement made by him immediately after the homicide when questioned about it, that, "I had it in for the son of a b—h for the last two years: I could have got even with him a year ago, but I didn't do it; but to-day I got a good chance and I took that chance with powder and ball." Besides this, three physicians were examined on the trial. One of them, introduced on behalf of defendant, testified that he had never made insanity a specialty, but had treated in a practice of twenty years forty or fifty persons of unsound mind,

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that he had made, since the homicide, personal examination of defendant, and from his examination and so much of the evidence as he had heard, he was of the opinion that defendant was insane. The other two physicians were introduced on the part of the State. One of them, Dr. Bauduy, testified that he was a professor, in a medical college, of diseases of the mind and nervous system, and had been for fourteen years in charge of St. Vincent's Lunatic Asylum, and for that period of time had from 150 to 500 patients under his daily care, that it was his constant occupation to be with the insane, and that he had made the study of insanity and diseases of the nervous system specialties. The other, Dr. Hughes, testified that he had for eleven years made the study of insanity a specialty, and for about six years of that time had been in charge of the State Insane Asylum, at Fulton, and had treated 3,000 insane patients. A question in writing stating a hypothetical case embracing all the material evidence submitted on either side was put to these witnesses, and they were requested to base their opinion upon the facts stated in the question as to the insanity of defendant at the time he killed the deceased. Dr. Bauduy answered that, basing his opinion solely upon the hypothetical case, it was that at the time of the commission of the homicide the defendant was sane, and after giving his scientific reasons for his conclusions added: "I see in that hypothetical case no scintilla of insanity whatever." Dr. Hughes, in answer to the question, also gave it as his opinion that the accused was sane at the time the homicide was committed. We have held that in criminal cases, where it clearly appears that the verdict is against the weight of evidence, this court would interfere to set it aside. But in this case, after a careful examination of the evidence, we cannot say that the verdict is against the weight of evidence and will not therefore interfere.

The newly discovered evidence set out in the motion as a ground for a new trial being entirely cumulative, the

motion was properly overruled for that reason. Perceiving no error either in giving or refusing instructions or in admitting or rejecting evidence, the judgment is affirmed, in which Judges SHERWOOD, HOUGH and NAPTON concur, and Judge HENRY dissents.

HENRY, J., DISSENTING.—I cannot concur in the foregoing opinion, and will briefly state my reasons for dissenting. The allegation, that defendant willfully, deliberately and premeditatedly committed the homicide for which he is indicted, includes the allegation that he had a mind capable of willing, deliberating and premeditating. Willfulness, premeditation and deliberation are constituent elements of murder, and none but a sane person can commit that, or any other crime. Homicide is not necessarily a crime, for one may kill in self-defense, or by accident, or in a state of mental aberration. If the State prove the killing, she is not also required to prove that it was not in self-defense, or not the result of accident; but when defendant has proven enough to raise a reasonable doubt whether it was in self-defense, or accidental, the State must show, not by a mere preponderance of evidence, but beyond a reasonable doubt, that it was not accidental or in self-defense; and it is difficult to perceive a reason, why the same principle is not equally applicable to the issue of sanity made by the plea of not guilty. It is true that the law presumes every one to be sane, and therefore the State is not required to introduce evidence of the sanity of the accused except in rebuttal. The sanity of defendant is as much in issue as the homicide; and although the law presumes certain facts to exist when certain other facts are proven, yet in a criminal case, when the fact presumed is disproved, or sufficient evidence is adduced to warrant a reasonable doubt of its existence, the presumption ceases. To say that only a sane person can be guilty, and declare the law to be, that the State must establish defendant's guilt beyond a reasonable doubt, and yet that, unless de-

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defendant establishes his insanity by a preponderance of evidence, the jury should convict, is a palpable contradiction. If one accused of murder admit the homicide and allege that it was an accident, it is for him to make that appear, but if he introduce evidence tending to prove that fact sufficient to beget in the minds of the jury a reasonable doubt that the killing was intentional, the benefit of that doubt he is entitled to by law. What is the substance of the defense in either case? Simply that, although the homicide was committed by the defendant, his mind did not concur in the act; and yet, in the case of the one who admits his sanity, he has the benefit of a reasonable doubt that the act had the assent of his mind, while it is urged that the other, who alleges his insanity, shall not have the benefit of a reasonable doubt, but must prove, by a preponderance of evidence, a state of facts showing that the mind did not concur. The distinction has no reasonable foundation for its support. If a jury are to acquit on a reasonable doubt of defendant's guilt, and one cannot be guilty if insane, by what process of reasoning will a jury, having a reasonable doubt of defendant's sanity, come to the conclusion that they should convict notwithstanding the instruction that a reasonable doubt of his guilt entitles him to an acquittal? A man whose thinking is not regulated by artificial rules would not hesitate to acquit under such circumstances, and it would require a most refined and ingenious argument to demonstrate to him that he could convict without disregarding that instruction. But it is said that the law presumes him sane, and that this presumption deprives the accused of the benefit of a reasonable doubt as to his sanity. The one proposition is based upon the fact that sanity is the normal condition of the human mind, and that insanity is exceptional and abnormal. The other presumption is in favor of life and liberty. The former presumption has no effect but to relieve the State, in the first instance, from making any proof on the subject, holding that the fact that the accused is a human being dispenses

with proof of his sanity, because that is the normal condition of human beings. It simply reverses the order, not the burden, of proof. It presumes the accused sane, but requires him to make no more proof of his insanity than of any other fact which he relies upon for his acquittal of the crime he is charged with. The one presumption does not destroy the other, as to any fact which must be found to exist in order to a conviction. I cite no authorities in support of these propositions, but they are numerous and respectable.

THE INTERNATIONAL BANK, *Appellant*, v. THE GERMAN BANK.

1. **Effect of Blank Indorsement of Non-negotiable Certificate of Deposit.** A blank indorsement of a non-negotiable certificate of deposit by the payee thereof, accompanied by delivery, will enable the holder to make a valid pledge of the certificate to an innocent party, without reference to the equities between himself and the payee. The pledgee is authorized to infer absolute ownership and full right in the holder to pledge; but as against the true owner his recovery will be limited to the amount of his loan.
2. ——. The certificate in question in this case had, written across its face, the following words: "This certificate is subject to any subsequent claim for collection or any other fees arising out of the disbursement of the legacy of which this money is part of proceeds." The bank which issued the certificate not asserting any rights under this stipulation, *Held*, that as between the other parties, it did not affect the operation of the foregoing rule.

Appeal from St. Louis Court of Appeals.

REVERSED.

F. & E. L. Gottschalk for appellant.

T. A. & H. M. Post for respondent Boecke.

1. To be estopped, Boecke must have intended to influence the conduct of the party invoking the estoppel.

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Dezel v. Odell; *Devereux v. Burgwyn*, 5 Ired. Eq. 355; *Welland Canal Co. v. Hathaway*, 8 Wend. 483; *Howard v. Hudson*, 2 El. & Bl. 1; *Plumer v. Lord*, 9 Allen 458; *Audenried v. Betteley*, 5 Allen 385; *Pickard v. Sears*, 6 Ad. & El. 474; *Copeland v. Copeland*, 28 Me. 539; *Califf v. Hillhouse*, 3 Minn. 315; *Reynolds v. Lounsbury*, 6 Hill 536; *Big. Estop.* 380; *Turner v. Coffin*, 12 Allen 401; *Biddle v. Merc. Min. Co.*, 14 Cal. 368; *Combs v. Cooper*, 5 Minn. 254; *McAfferty v. Conover*, 7 Ohio St. 99.

2. He must have been guilty of such conduct as would make it fraudulent and against good conscience to assert his right. *Welland Canal Co. v. Hathaway*, *supra*; *Devereux v. Burgwyn*, *supra*; *State v. Potter*, 63 Mo. 225; *Burleson v. Burleson*, 28 Texas 415; *Biddle v. Merc. Min. Co.*, *supra*; 1 Story Eq., § 391; *Bragg v. Bost. & Wor. R. R.*, 9 Allen 62; *Danforth v. Adams*, 29 Conn. 111. There is a total failure of proof or pretense of proof of either fact. There can be, therefore, no estoppel in the case.

3. Boecke's blank indorsement cannot, of itself, work an estoppel. That gave the People's Savings Institution no *indicia* of title. (a) His indorsement was the common mode of transfer adopted for any purpose for collection or otherwise. It was no guaranty of title. (b) It pretended to give no other title to plaintiffs than the law merchant would clothe the holder of non-negotiable paper with, viz: a title subject to the equities of Boecke. Plaintiff cannot claim that it was misled by the indorsement, when its error was caused by its own ignorance of the statute affecting commercial paper. (c) As a matter of law plaintiff cannot claim an estoppel created by the indorsement itself. *Mech. Bk. v. R. R.*, 13 N. Y. 638; *Big. Estop.* 481; *Clark v. Sisson*, 22 N. Y. 312.

NAPTON, J.—The facts of this case are undisputed, and are fully stated in the printed brief of appellant, conceded to be correct by the counsel for respondent, and are, therefore, for convenience here copied:

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acted within the scope of his authority in making the loan, and that he represented to plaintiff at the time that the collaterals so offered were the property of the People's Savings Institution; that Wuerpel, as such cashier, executed a note for said \$5,000, which became due on February 1st, 1875, a Monday, and that these collaterals were pinned to such note; that on January 30th, 1875, the Saturday before the Monday on which said note became due, in the afternoon, Wuerpel came to the teller of plaintiff, and said he wished to pay the loan of \$5,000, and then gave his check, certified by him as cashier, on the People's Savings Institution, of which he was cashier, for \$4,500, being the balance due on said loan, and in exchange the teller gave him the note with the collaterals attached; that next Monday, February 1st, 1875, in the morning, the teller of plaintiff was sent down to the People's Savings Institution but found the doors closed and that Wuerpel had absconded; that thereupon the plaintiff sued out a writ of replevin against said People's Savings Institution and against Fisse, its assignee, and by virtue of such writ obtained back said certificate of deposit; that said replevin suit was still pending, undecided, at the time of the trial of this case, (although since decided in favor of plaintiffs;) that Wuerpel, the cashier, absconded on January 31st, 1875, (Sunday;) that upon discovering this an assignment was made by the People's Savings Institution of its property and effects to John H. Fisse, on Monday, February 1st, 1875, and that he took possession thereof on that day, and found that Wuerpel, prior to his departure, had given his checks to various parties, to the amount of many thousand dollars in excess of the money on hand.

It was further shown that the International Bank, plaintiff, took said certificate in good faith, as one of the collaterals, and upon the representation of Wuerpel, that it was the property of the People's Savings Institution; that plaintiff had collected of the other collaterals only the sum of \$2,040.26; that plaintiff had presented to said

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assignee, Fisse, said certified check of \$4,500, for allowance, and that the same had been allowed, that said assignee had subsequently declared a dividend of two and one-half per cent, but that plaintiff had collected no part thereof. These are the facts and evidence.

The pleadings are: A petition filed by plaintiff, March 11th, 1875, against the German Bank, upon the certificate of deposit above set out, which petition is in the usual form. The answer of the German Bank admits the issue of said certificate, but sets out, that Hermann Boecke and said assignee, Fisse, both, also demand the amount due on said certificate; alleges its readiness to pay over the money or to bring it into court, and asks that said parties may be ordered to become parties to this suit and to interplead. Thereupon plaintiff moved to strike out from said answer all allegations showing that any other party made a claim to this certificate, which motion was overruled. Hermann Boecke filed also a petition in this case on April 20th, 1875, praying that he be permitted to interplead. This petition was granted and such leave given. Thereupon Boecke filed his interplea on May 15th, 1875. October 27th, 1875, John H. Fisse, assignee of the People's Savings Institution, by leave of court, also filed his interplea, claiming that defendant, the German Bank, should first pay the two notes made by Boecke. On January 5th, 1876, plaintiff filed a reply to the interplea of Boecke. On January 6th, 1876, the German Bank moved, and it was accordingly ordered, that it pay into the court the sum of \$3,050, that it pay \$40 to its attorneys, and that it be discharged.

On January 15th, 1876, the case went to trial before Judge John Wickham, under the pleadings and facts above stated. The plaintiff prayed for three instructions, all of which the court refused to give.

These instructions are as follows: 1. The court declares the law of this case to be, that, if the People's Savings Institution, by Edmund Wuerpel, its cashier, on the 30th day of January, fraudulently or by fraudulent repre-

sentation obtained possession of the certificate of deposit, and the plaintiff afterward replevied said certificate out of the hands of the People's Savings Institution, then the People's Savings Institution acquired no right to, or interest in said certificate by reason of such possession, nor did plaintiff lose any right or interest therein, but he is entitled to the same rights that he would have had, if the certificate had remained in his possession continuously up to the time of bringing this suit.

2. The court declares the law of this case to be as follows: It being admitted by all the parties, that the certificate of deposit on which suit is brought was indorsed in blank by Boecke, the payee, and by him delivered before maturity to the People's Savings Institution, the effect of such indorsement and delivery was equivalent to an acknowledgment on the part of Boecke, that he had parted with the ownership of said certificate, and he is estopped from setting up any claim to, or interest in the same, as against the rights of the plaintiff, provided plaintiff took the certificate from the People's Savings Institution as collateral for a loan, before maturity, without any notice of Boecke's ownership or claim, but upon the representation of Wuerpel, the cashier, that the People's Savings Institution was the true and lawful owner of the certificate.

3. If the court, sitting as a jury, believe from the evidence that the certificate of deposit, on which this suit is brought, was indorsed by Hermann Boecke, the payee, before its maturity, and that said certificate, after such indorsement and before maturity, was assigned to plaintiff as collateral security for a loan obtained upon the faith and credit of that and other securities, that plaintiff took said certificate in good faith, without any notice of any defect in the title thereof, or of any equities existing against the payment of the same, and if the court further believe from the evidence that the said loan has not been wholly paid, then the court will find for the plaintiff.

Thereupon the interpleader, Boecke, prayed for the

following instructions, which the court gave: 1. The court declares the law to be, that if the plaintiff took a check for the amount of the note for which the certificate of deposit in controversy was given as a collateral, and voluntarily surrendered up the note and certificate, then plaintiff has no claim upon Boecke's equity of redemption to said certificate of deposit, even although the money was never paid on said check.

2. The court declares the law to be, that the instrument sued on in this case is not a negotiable instrument, and that, therefore, it is subject in the hands of plaintiff to all the defenses which would exist against the People's Savings Institution, and plaintiff could acquire no other or greater title or claim to said instrument than the said People's Savings Institution had therein when transferred by it to the plaintiff.

3. The court declares the law to be that the certificate of deposit in controversy is not a negotiable promissory note, and plaintiff, the International Bank, must, therefore, show that it paid value for said certificate, even though it obtained said certificate before maturity.

The court thereupon rendered judgment that, out of the fund deposited by the German Bank, the two notes made by Boecke to the People's Savings Institution should be paid to John H. Fisse, and the balance to H. Boecke, and nothing to plaintiff. Plaintiff appealed to the court of appeals, which reversed the judgment below and rendered a judgment substantially the same as that of the circuit court, so far as Boecke was concerned, but adjudged the \$450 borrowed of the People's Savings Institution to the plaintiff, and the case comes to this court by appeal from this last judgment.

The principles upon which a determination of this case depends are well established and recognized by this court in prior adjudications, and rest on solid foundations of justice and equity; but the application of these principles, which all recognize to be right, has occasioned considera-

ble diversity of opinion, partly on account of the facts peculiar to each case, and partly owing to statutory regulations peculiar to the State where the questions arose. I am not aware of any case like the present having ever come before this court, and, although we have been referred to cases in California, New York, Ohio, Pennsylvania and Massachusetts, they are mostly in reference to mining stocks and bank stocks, and their mode of transfer regulated by State laws. We have examined all of these cases that are accessible, and endeavored to ascertain from them how far the transfer of the certificate of deposit in this case ought, upon the principles agreed on, to be governed by these decisions.

I propose to discard from consideration any investigation into the question largely discussed by the counsel on either side, and apparently entering largely into the consideration of the circuit court, which originally decided the case, and of the court of appeals where it was last disposed of, whether the certificate of deposit by Boecke was a negotiable instrument or not. That it was transferable by delivery and indorsement is not disputed. "The term 'negotiable,'" as was observed by Judge Scott in *Odell v. Gray*, 15 Mo. 342, "in its enlarged signification, applies to any written security which may be transferred by indorsement or delivery, so as to vest in the indorsee the legal title, so as to enable him to maintain a suit thereon in his own name. In this sense of the term, a bond under the statute concerning bonds and notes may be said to be negotiable, and in this sense is the term understood when applied to paper in cases similar to that now under consideration. In this State, where there exist both bonds and promissory notes which are negotiable, but yet have none of the properties of a bill of exchange, but their being suable upon in the name of the indorsee, and notes with all of the characteristics of a bill of exchange, the term 'assignable' is usually applied to the former and 'negotiable' to the latter class of those instruments."

We shall assume, therefore, that the certificate of deposit was a non-negotiable instrument in the restricted sense of the term "negotiable," referred to by Judge Scott. It was assignable, however, and was assigned by an indorsement in blank of Herman Boecke. What was the object and effect of this blank indorsement? It is said the object was safe keeping, and as collateral security for the loan of \$450 borrowed of the bank. So far as safe keeping is concerned, one would think that it could be as safely kept without his name on the back as with it. As collateral security, it could only be of use as an authority to write over the name of the indorser that of the indorsee, or that of any one else to whom he might sell or pledge it, with a view to collect the certificate, or to raise money on its transfer.

In New York, it seems that certificates of stock in a bank are usually made transferable only on the books of the bank by the owner of the stock, or his attorney, yet the supreme court of that State held, in *Kortright v. Buffalo Commercial Bank*, that a certificate of stock is transferable by a blank indorsement, which may be filled up by the holder, by writing an assignment and power of attorney over the signature indorsed. The court observes: "The execution in blank must have been for the express purpose of enabling the holder, whoever he might be, to fill it up. If intended to be filled up in the name of the first transferee, there would have been no necessity for its execution in blank. The filling up is but the execution of an authority clearly conveyed to the holder, is lawful in itself and convenient to all parties, as it avoids the necessity of needlessly multiplying transfers on the books" 20 Wend. 93. This case was taken to the court of errors, (22 Wend. 360,) where the judgment of the supreme court was affirmed, with the dissent of the chancellor and two or three senators. So far as the point we are now considering is concerned, the opinion of the court is chiefly aimed to show that a sealed transfer in blank of bank stock, which

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seems to be admitted requisite, by reason, I presume, of the terms of the bank charter or some by-law on the subject, would authorize the transferee to write a full assignment and a power of attorney over the signature thus made under seal. It is unnecessary to insert the reasoning of the court or its conclusions on this point, since it will not be and has not been pretended that any seal is necessary to an assignment of a bank certificate of deposit, or any power of attorney in this State or elsewhere. If an assignment in blank, under seal, in cases where a seal is requisite, will still authorize the holder to write over it the necessary power of attorney, it surely must follow *a fortiori* that such assignments, or indorsements, without seal, where none is required and where no power of attorney is required, will have equal efficacy in transferring the legal title to the indorsee, assignee or holder.

This question was again discussed in *McNeil v. The Tenth National Bank*, 46 N. Y. 329, before the court of appeals, composed of seven judges, in which all the judges who expressed any opinion concurred. In that case, the judge delivering the opinion of the court observes: "The true point of inquiry in this case is, whether the plaintiff did confer upon his brokers such an apparent title to, or power of disposition over, the shares in question as will thus estop him from asserting his own title, as against parties who took *bona fide* through the brokers." This, it will be perceived, is also a case of a transfer of bank stock, but what is said has a bearing on the present case, and we therefore copy it: "It is said in some English cases that blank assignments of shares in corporations are irregular and invalid, but that opinion is expressed in cases where the shares could only be transferred by deed under seal, duly attested, and is placed upon the ground that a deed cannot be executed in blank. Without referring to the American doctrine on that subject, it is sufficient to say that no such formality was requisite in this case. It was only necessary to a valid transfer, as between the parties,

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that the assignment and power should be in writing. The common practice of passing the title to stock by delivery of the certificate with blank assignment and power has been repeatedly shown and sanctioned in cases which have come before our courts, * * and in the case of *Kortright v. Commercial Bank of Buffalo*, 20 Wend. 91, and 22 Wend. 348, the same usage was established as existing in New York and other States, and it was expressly held that, even in the absence of such usage, a blank transfer on the back of the certificate to which the holder has affixed his name is a good assignment, and that a party to whom it is delivered is authorized to fill it up by writing a transfer and power of attorney over the signature. It has also been held, by repeated adjudications, that, as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them, except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment not on the books passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections, etc."

The case of *Moore v. Metropolitan Bank*, 55 N. Y. 41, was not a case of bank stock, but of a certificate of indebtedness of the State of New York, issued by the capitol commissioners, and this certificate was not assigned in blank, and therefore the case has no application to the question now under consideration. It, however, reviewed and reaffirmed the decisions heretofore cited, all the court, (seven judges) concurring, except Allen, J., who dissented, and it was decided, (there being no question about an assign-

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ment in blank) that a *bona fide* purchaser for value of a non-negotiable chose in action from one, upon whom the owner has, by assignment, conferred the apparent absolute ownership, where the purchase is made upon the faith of such apparent ownership, obtains a valid title as against the real owner, who is estopped from asserting a title in hostility thereto. Had the assignment been in blank, it would have been precisely the same question with the one presented by the case before us, and we will therefore take occasion to refer to it again, when we pass to the main point in this case.

† The same principle is asserted in *Weirick v. Mahoning Co. Bank*, 16 Ohio St. 296. This was the case of a deposit in one bank to the credit of another bank. The depositor, without the knowledge of the last bank, took a letter from the bank where the money was deposited to the bank to whose credit it was placed, advising it of the deposit, and afterward delivered the letter to a third person named Wolfe, with his own name indorsed in blank thereon, for presentation to the bank to whose credit the deposit was made. The bearer of the letter wrote the following order over the signature of the depositor: "Pay the within to T. M. Wolfe," and it was held that the bearer of the letter had authority to control the fund and to write the above order over the signature in blank, and that a payment to Wolfe was authorized. †The court observed that "it is well settled that if one intrusts his name in blank to another to procure a discount, he is liable to the full extent to which such other may see fit to bind him when the paper is taken in good faith, without notice that the authority given is exceeded. The authority conferred by such blank signatures is said to be that of a general letter of credit. It is no defense against a *bona fide* holder to prove that the person to whom the paper was intrusted was only authorized to use it for a particular purpose, and had fraudulently converted it to a different purpose, or that he was only authorized to fill the blank upon a certain condition which

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had not happened." It will be observed that this was an application of the principles which govern in negotiable paper, not merely to a blank assignment of a non-negotiable certificate, but to a mere letter written by the bank in which the deposit was made, addressed to the bank where the note of the depositor was due, and indorsed to a friend as a matter of convenience, in order that the depositor might get credit for the amount, but the court held "that the indorsement in blank having been made, and with the voucher delivered to Wolfe, the bank, in the absence of any just ground to suspect the *bona fides* of Wolfe, had a right to presume him invested with full authority over the fund, and might safely pay him the money or apply it as he might direct."

The case of *Combes v. Chandler*, decided in the Ohio supreme court in 1878, is not accessible, the volume containing the decision in October of that year not being in the State library, but the report of its substance in the Albany Law Journal (Vol. 18 p. 358) is doubtless, correct. This report represents the decision as follows: "A *bona fide* purchaser for value of a non-negotiable chose in action from one upon whom the owner has by assignment conferred the apparent absolute ownership, when the purchase is made upon the faith of such apparent ownership, obtains a valid title against the real owner, who is estopped from claiming title thereto." (See 33 Ohio St. 178.—REPORTER.)

In California there have been three cases decisive of the question under consideration, the last one made in 1879. This was the case of *Winter v. Belmont Mining Company*, 53 Cal. 428. In this case it was held that where the owner of certain mining stocks caused them to be transferred on the books of the corporation to another, who was there called "trustee," and the certificate was issued to such trustee, and such trustee indorsed the certificate in blank and delivered it to a third person, from whom it was stolen and put on the market by the thief, the purchaser in good

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faith and for value acquired a valid title to the stock as against the owner. In this case the person who committed the theft happened to be the "trustee," but I presume the party to whom it had been delivered with a blank indorsement would have been equally competent to pass the title. It had been previously held that the addition of the word "trustee" to the name in which the stock was registered and a blank assignment in such name, did not show that the person so styling himself had not full power to deal with it as his own, and gave no notice to the party buying the certificate that any other person had an interest in it; on the contrary, though indicating that he had a *cestui que trust*, yet the reasonable presumption was that as the legal holder he had the right to dispose of it. *Thompson v. Toland*, 48 Cal. 99. In this case the court remarked that the owner had permitted the certificates to remain in the hands of the person in whose name they had been registered, and indorsed in such manner as to pass by delivery, and with nothing on their face to indicate that he had any interest in them, or that they were not the property of the registered owner whom he clothed with all the usual *indicia* of the ownership of mining stock. "He had," observes the court, "placed them in a position to deal with the stocks as though they were the absolute owners. *

* He clothed them with such an apparent ownership as to mislead the public. * * Under such circumstances the party who places another in a position to practice the fraud should suffer the loss, rather than an innocent person who deals with him on the faith of the usual *indicia* of ownership with which the true owner has invested him."

† We deem these authorities sufficient to show that the blank indorsement of Boecke upon the certificate of deposit and the delivery to the cashier of the People's Savings Institution with this indorsement, was such a transfer of the title as to authorize those dealing with the latter to infer an absolute ownership in the People's Savings Institution,

and a full authority on their part to sell or pledge the certificate.

It is said, however, that the writing in red ink on the back of this certificate was sufficient to put a party purchasing on inquiry, thereby distinguishing it from an ordinary non-negotiable promissory note. We are unable to perceive any importance to be attached to this writing. It could only be regarded as an idle and superfluous declaration on the part of the bank of rights of lien, which the law gave them without any declaration, and it seems no such fees as are specified, accrued. It did not concern the interpleaders and did not affect the question between them. It was placed on the certificate for the protection of the bank where the deposit was made. This bank placed in court the whole amount of the deposit and was discharged.

† The question then between the interpleaders resolves itself into the propriety of the doctrine that where one of two innocent persons must sustain a loss, occasioned by the fraud of a third, it must fall upon the one who puts it in the power of the third person to commit the fraud. This doctrine has been repeatedly recognized by this court, and no citation of authorities is thought necessary. But it is said that when applied to the transfer of non-negotiable paper, it conflicts with the equally well established doctrine that in regard to every security, other than negotiable paper, the vendor or pledgeor can convey no greater or better title than he has himself. No better answer to this objection can be made than was by the judge who delivered the opinion of the court of appeals, in New York, in the case of *McNeil v. Tenth National Bank*. "This doctrine" says the learned judge in that case, "is a truism, predicable of a simple transfer from one party to another, where no other element intervenes. It does not interfere with the well-established principle, that where the true owner holds out another, or allows him to appear as the owner of, or as having full power of disposition over the

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property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." 46 N. Y. 329; 15 East. 38; 10 Adolph. & Ellis 90; 20 Wend. 268, 284; 8 Cowen, 238; 13 Wend. 570.

It is further objected that this doctrine, when applied to non-negotiable paper, in effect puts it on the same footing with negotiable instruments. To this it may also be replied in the language of Judge Grover, of the court of appeals of New York, in *Moore v. The Metropolitan Bank*, 55 N. Y. 48, that it has no such effect. "No one pretends," says Judge Grover, "but that the purchaser of non-negotiable choses in action will take them subject to all defenses, valid as to the original parties, nor that the mere possession is any more evidence of title in the possessor than is that of a horse. In both respects the difference between them and negotiable instruments is vital, and not at all affected by the application of the same rule as to chattels." The learned judge then proceeds to examine the New York cases, and after overruling that of *Bush v. Lathrop*, 22 N. Y. 535, on this point, and reiterating the doctrines in *McNeil v. The Tenth National Bank*, to which we have already referred, concludes, that "the bank, if it made the loan to Miller in good faith, upon the credit of the certificate, acquired a title thereto, valid against the plaintiff to the extent of the loan." That being our conclusion in regard to the claim of the International Bank of St. Louis, the judgment of the court of appeals is reversed, and the case is remanded to the circuit court to enter judgment in conformity with this opinion. All concur.

McPike v. West.

McPIKE V. WEST *et al.*, Appellants.

Injunction: IRREPARABLE DAMAGE. A petition which shows that defendants are about to open a road through plaintiff's premises and for that purpose are about to cut plaintiff's timber and hedges and remove his fences, thereby exposing his crops and fruit trees, and his meadow and pasture lands to the depredations of stock, states a good cause for injunction. It is not necessary to aver and prove in addition that the defendants are insolvent. Such injuries would be irreparable in a legal sense.

Appeal from Knox Circuit Court.—HON. JNO. C. ANDERSON,
Judge.

AFFIRMED.

O. D. Jones for appellant.

PER CURIAM.—This was a suit to enjoin the defendants from unlawfully opening a road over the premises of plaintiff, and from cutting his timber and hedges and removing his fences for that purpose, thereby exposing his crops and fruit trees and meadows and pasture lands to the depredations of stock of all kinds. A temporary injunction was granted by the judge of the probate court under the seventeenth section of the act of 1873, (Session Acts, 1873, p. 170), it appearing from the affidavit of the plaintiff that the circuit court of the county was not in session, and that the judge of said court was not within the county. Some informalities attended the approval of the bond by the probate judge. At the hearing in the circuit court the injunction was made perpetual. As the petition was regularly filed with the circuit clerk and the circuit court took cognizance of the cause and tried the same, and rendered a final judgment therein, the regularity of the preliminary proceedings is not material, and it will, therefore, not be necessary to notice the various objections thereto made by the defendant. The petition states a good cause of action. In addition to the injury threatened, it alleges the insolv-

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ency of all the defendants save the road overseers. No allegation of insolvency was necessary, however, as the facts stated show that the injury threatened would have been irreparable, within the legal definition of that term. *McKinzie v. Mathews*, 59 Mo. 99; *Carpenter v. Grisham*, 59 Mo. 247; *State Savings Bank v. Kercheval*, 65 Mo. 682. The testimony introduced on the trial was conflicting, but after carefully reviewing it, we are not prepared to say that the conclusion reached by the circuit court was wrong. The judgment will, therefore, be affirmed. All concur.

THE STATE V. REED, *Appellant*.

Practice: IMPROPER REMARKS BY PROSECUTING ATTORNEY. The trial court having failed to instruct the jury upon a material point, the prosecuting attorney, in his closing argument, undertook to supply the omission, and in doing so, against the defendant's objection and without interruption by the court, used language which was calculated to mislead the jury, and which the record seemed to show did mislead them. For this the judgment was reversed.

Appeal from Butler Circuit Court.

REVERSED.

S. M. Chapman for appellant.

J. L. Smith, Attorney-General, for the State.

NORTON, J.—This cause is here by appeal from a judgment of the circuit court of Butler county sentencing defendant to two years imprisonment in the penitentiary for stealing a hog, for which offense he was indicted, tried and convicted in said court. The only evidence tending to show that defendant stole the hog in question was the fact that soon after the hog was missed by the owner it was found in the possession of defendant, who claimed to have bought it from some persons who had stopped at his house

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with a drove of hogs, and the fact that he did so purchase it was proven by several witnesses. The court gave no instruction in regard to the legal effect of defendant's possession of the hog soon after it was stolen, if it was in fact stolen, which the evidence of the owner of it left in doubt, but the jury was allowed to grope in the dark upon that subject. In the closing argument the prosecuting attorney, against the objection of defendant, undertook to supply the omission made by the court, and argued to the jury as to the presumptions of guilt and inferences to be drawn therefrom when property was stolen and found in the possession of a person soon after the "supposed theft." The court, having abdicated its duty in failing to instruct the jury as to what effect was to be given to the fact proved, that defendant was in possession of the hog alleged to have been stolen, should at the least have forbidden the prosecuting attorney, who in his closing argument assumed the duty thus omitted, from making any statement calculated to mislead the jury as to the law governing that question. We think his remarks were of that character, and from the use by him of the words "supposed theft," the jury might well have concluded that it was not incumbent on the State to prove the *corpus delicti*, or the fact that the hog was stolen, but that it was only necessary for the State to offer evidence sufficient to justify a suspicion that the hog had been stolen and that the possession of property supposed to have been stolen would authorize a conviction. That the jury were thus misled is entirely probable, as the record shows that, unless they were, they could only have reached the conclusion they did by disbelieving and discrediting three witnesses who were in no way impeached. Judgment reversed and cause remanded, in which all concur.

Murphy v. The St. Louis & Iron Mountain Railroad Company.

MURPHY V. THE ST. LOUIS & IRON MOUNTAIN RAILROAD COMPANY, *Appellant*.

Master and Servant: PERSONAL INJURY THROUGH INCOMPETENCY OF FELLOW SERVANT: BURDEN OF PROOF. Proof that a servant was incompetent does not devolve upon his master when sued for injuries occurring to a fellow servant through such incompetency, the burden of proving that the master used ordinary care and prudence in the selection of the servant.

Appeal from St. Louis Court of Appeals.

REVERSED.

Thoroughman & Warren for appellant.

P. E. Bland for respondent.

HOUGH, J.—The plaintiff, who was engineer of a passenger train on the defendant's road, was injured by reason of a collision with a freight train, of which one E. W. Evans was conductor. The petition alleged, among other causes of the injury, that said conductor was incompetent; that the collision resulted from his incompetency, and that the defendant was guilty of negligence in employing him. These allegations were denied by the answer. The testimony was conflicting. The jury were instructed that the burden of proof was on the plaintiff to establish the unfitness and incompetency of the conductor, Evans, and that the injury complained of resulted from his unfitness and incompetency, but that the burden was on the defendant to establish that it used ordinary care and prudence in the selection and appointment of said Evans, as conductor. The court erred in thus instructing the jury. The mere fact of the incompetency of a servant for the work upon which he was employed is not enough to warrant a jury in finding the master guilty of negligence in employing him. *Shearman & Redfield on Negligence*, § 91; *Moss v. P. R. R.*, 49 Mo. 169; *Elliott v. St. L. & I. M. R. R.*, 67 Mo. 272.

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It is true that the testimony by which the incompetency of a servant is established may be such as to warrant the inference that the master had notice of his incompetency, or that he omitted to make such inquiries as common prudence would have dictated, and thus failed to exercise ordinary care in selecting him; but such inference is one of fact to be drawn by the jury under proper instructions from the court.

We cannot say from the record before us that the jury has ever found that the defendant was guilty of negligence in employing Evans. It is true they were told in the first instruction given for the plaintiff that there could be no recovery unless the defendant was negligent in employing him, but they were also told that if the conductor was incompetent, that was sufficient evidence that the master was guilty of negligence in employing him.

It will not do for an appellate court to permit a judgment to stand when all the facts necessary to a recovery have not been found, simply for the reason that there was testimony from which they might have been found.

The judgment of the court of appeals and that of the circuit court will be reversed and the cause remanded for a new trial. All concur.

THE WILSON SEWING MACHINE COMPANY, *Appellant*, v. THE
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

1. **Consignee Non-resident at point of Delivery:** DELIVERY TO CONSIGNOR'S AGENT. The fact that a consignee does not reside at the point where goods are to be delivered, and does not expect to be there to receive them, will not authorize the carrier to deliver them to a general agent of the consignor resident there.
2. **Instructions.** It is not essential that an instruction which undertakes to define the principal rule of liability in a case, shall state all the exceptions to the rule which may arise under the pleadings and evidence. If these are correctly stated in one or more separate instructions, it is sufficient.

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3. ———: **CASE ADJUDGED.** The defense to an action by a consignor against the carrier for the conversion of certain sewing machines which had been consigned to K at M, was in substance, that K did not live at M, and did not expect to be there to receive the machines; that it was understood between plaintiff and defendant that on arrival at M they were to be delivered to B & S, who were plaintiff's agents and dealt in sewing machines of plaintiff's manufacture at M, and that they were so delivered. Among the evidence offered by defendant was testimony tending to show that B & S had obtained the machines by representing to defendant's agents that they were intended for them. For the plaintiff the court instructed the jury, in substance, that defendant was bound to deliver the machines to K, and that the mere fact that B & S had made such representations and had thus obtained the machines, was no defense, if the representations were untrue in fact; and further instructed that the fact that K was not and did not intend to be at M, did not of itself justify defendant in delivering the machines to B & S. For defendant the court instructed, in substance, that if they found that the understanding alleged in the answer existed, their verdict should be for defendant. *Held*, that these instructions, taken together, put the case fairly before the jury.

Appeal from St. Louis Court of Appeals.

REVERSED.

J. H. Wieting and Geo. M. Stewart for appellant.

1. It was the duty of defendant to deliver the machines to the persons named in the bills of lading. *Bristol v. R. R. Co.*, 9 Barb. 158; *Jeffersonville R. R. Co. v. White*, 6 Bush (Ky.) 251; *Winslow v. R. R. Co.*, 42 Vt. 700; *McEntee v. Steamboat Co.*, 45 N. Y. 37; *Price v. R. R. Co.*, 50 N. Y. 213; *Thorne v. Tilbury*, 3 Hurls. & N. 534; *Angle v. R. R. Co.*, 9 Iowa 488; *s. c.*, 18 Iowa 555; *Alderman v. Eastern R. R.*, 115 Mass. 233; 2 Redfield on Railways, (5 Ed.) p. 203.

2. Plaintiff's instructions numbers one and two were not calculated to mislead the jury, and are not inconsistent with the others given in the case. On the contrary, taken in connection with the others, they put the case properly before the jury. *Henschen v. O'Bannon*, 56 Mo. 289;

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Kitchen v. R. R. Co., 59 Mo. 514; *Prewitt v. Martin*, 59 Mo. 335; *Budd v. Hoffheimer*, 52 Mo. 303; *Porter v. Harrison*, 52 Mo. 527.

C. M. Stephens and Dryden & Dryden for respondent.

The first and second instructions given for plaintiff are so framed as necessarily to confuse and mislead the jury. All the facts supposed in them were admitted, and the instructions are peremptory that, if those facts exist, they shall find for the plaintiff. They carefully ignore the issue in the case and the evidence in support of it, viz.: That the delivery to Beach & Sutherland was with the assent of the plaintiff. Had the court told the jury in plain words that, upon the facts assumed, the law, in the absence of proof of a contrary agreement, would imply an agreement to deliver to the consignee, or to hold or store for him, it would have been well enough; and the jury would have understood that they were at liberty to consider and be governed by the evidence which tended to show the plaintiff's assent to the delivery to Beach & Sutherland, but they were not so told, and without such explanation the jury would not regard themselves as having any such liberty, and under this false and erroneous direction the jury most naturally reached a false verdict. In vain might we contend before the jury that the evidence proved the delivery to Beach & Sutherland was by the direction and with the consent of the plaintiff, and therefore a proper delivery. To refute us, it was only necessary to point to the second instruction, which showed that all such proof was unavailing. Nothing under that instruction would deliver the defendant, but a holding or a storing of the goods for the owner. The issue and the proof of it were not of the slightest consequence.

NAPTON, J.—The only question of importance in this case is the propriety of the instructions given by the court. As the principal objections to them were not so much on

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account of any defects in them, as abstract declarations of law, as their inapplicability to the facts proved, and the points in issue and their tendency to mislead and confuse the jury, it is necessary, in order to determine the force of such objections, to state the facts in evidence. In doing this, I will be understood as stating them as found by the jury, where there is any discrepancy in the testimony, though I must acknowledge that, after a careful examination of this evidence, which consists entirely of depositions and documents accompanying them, it requires considerable critical acumen to discover any material variances.

The action is one brought by the shipper of goods against the carrier for breach of contract of affreightment. There were five different consignments, of date June 1st, June 29th, July 25th, August 24th and October 6th, all in 1872, and there are five counts in the petition, but they are precisely alike, except as to dates and amounts. The first count charges that, on June 1st, 1872, the plaintiff delivered to defendant thirty-six boxes of sewing machines, worth \$1,112, consigned to T. Kendall, Memphis, Tenn.; that defendant failed to deliver the same; alleges the plaintiff's ownership, the defendant's conversion of the goods, &c., in the usual form. The defense set up in the answer is that, although the goods were consigned to T. Kendall, "it was intended by plaintiff, and well understood by both plaintiff and defendant, that, on the arrival of said goods at Memphis, the said Kendall not being there, (and not expecting to be,) to receive said goods, the goods were to be delivered to Beach & Sutherland, dealers in sewing machines of plaintiff's manufacture," on whose order they were shipped, and to whom the defendant had previously delivered several packages, with consent of plaintiff, and that the goods in question were thus delivered in pursuance of this understanding. The answer further states that this last delivery was known to plaintiff, and assented to and ratified, and no objection made until one year after delivery, and after it was discovered that the price could not be col-

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lected of Beach & Sutherland. It is further alleged that Beach & Sutherland were plaintiff's agents at Memphis, and as such, authorized to receive the consignments.

The facts, as sought to be proved by plaintiff, and as I presume the jury found them to be, were, in substance, these: The plaintiff was a corporation having a large manufactory of sewing machines in Cleveland. Beach & Sutherland were dealers in these machines in Memphis. In 1870 they had a contract, in writing, by which the sewing machine company were to furnish them, from time to time, with sewing machines, at a certain price below that at retail, in consideration that the firm of Beach & Sutherland would devote themselves exclusively to the selling of such machines, and would take a certain number each year. Beach & Sutherland were to pay cash for all machines ordered, until a certain mortgage was given. As the mortgage was not given, the machines were always consigned to some third party, and the bills of lading were taken in the name of the consignees. To these bills of lading were attached drafts on Beach & Sutherland, and these bills of lading and drafts were sent to a bank in Memphis, with directions that the bills of lading were not to be delivered to Beach & Sutherland until the drafts were paid. In regard to the shipments from June 1st to October 6th, 1872, the subject matter of this action, the consignments were to different employees of the plaintiff at Cleveland, and the boxes were marked with the name of the consignee, and, according to the testimony of plaintiff's witnesses, marked on the outside of each box, in large letters, from a stencil plate, with this direction: "To be delivered to the consignee only, or his order." The freight agent of defendant, however, stated that, if there was such direction, he did not observe it, and thought he would have observed it had it been on the boxes. However this may have been, the bills of lading were made out, as before stated, in the name of the consignee, and these bills, with an order on the freight agent at Memphis, signed by the consignee, directing him

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to deliver the goods, on their paying freight, to Beach & Sutherland, and the drafts of plaintiff on Beach & Sutherland for the price, payable on or before four months after date, and an itemized bill of the goods made out in the name of Beach & Sutherland, and marked paid, and a transcript from plaintiff's order book, showing particulars of the shipment, were all tacked together and deposited in the First National Bank in Cleveland. This bank immediately sent all these papers to a bank in Memphis, with a letter of instruction not to deliver to Beach & Sutherland any of these papers until they paid the drafts or secured them. These five shipments all reached Memphis, and were delivered immediately to Beach & Sutherland, and freight bills made out in the name of the consignee. It appeared that, usually, it took from ten to twelve days for freight to go from Cleveland to Memphis, and of course Beach & Sutherland would be apprised by mail of the intended shipments in time to make arrangements with the bank to procure the necessary papers for their delivery to them. There was a good deal of testimony as to the limit of the credit which plaintiff was to extend to Beach & Sutherland, but, as it has no connection whatever with the present controversy, it is unnecessary to recite it. There was no evidence of any communication between plaintiff and defendant on the subject until, in November, 1872, the plaintiff first discovered that none of these five consignments had been paid for or the drafts secured, and yet they had all been delivered to Beach & Sutherland. An employee or agent was then sent to Memphis to inquire into the matter, and some proposals were made to the defendant, which were not agreed to. These are all the facts material to a consideration of the instructions, and their applicability to the case.

I must, however, not omit the exclusion by the court of a portion of Mr. Beach's deposition, at the instance of plaintiff, which is thus stated in the printed abstract: "*Question*: State if you used any means of advertising your business?" "*Answer*: I advertised mostly during 1871

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and 1872, in the weekly papers of country towns in Tennessee, Mississippi and Arkansas. Frequently copies of these papers were mailed to plaintiff. It was two years ago, and the papers named were destroyed. These advertisements described the merits of the machines, and that Beach & Sutherland were the general agents of the Wilson Sewing Machine Company at Memphis. They never objected to this, and I don't know why they should." This question and answer were excluded on objection of plaintiff to the same, as incompetent and irrelevant, and defendant duly excepted to the ruling of the court.

It appeared further, that the defendant had been in the habit, for a year or more previous to these five shipments, of delivering all machines sent to Memphis to B. & S., no matter how they were consigned, and that Mr. Beach had told some one of its agents that the machines were intended for him, and that he supposed the different names on the boxes and in the way-bills were intended merely to distinguish the shipments.

On the facts appearing at the trial, the court instructed the jury, at request of plaintiff as follows: 1. "When a railroad company receives goods for transportation, which are marked and directed to certain persons at a certain place, the law implies an agreement, on the part of the railroad, under ordinary circumstances, to transport the goods to such place, and there deliver them to, or have them held or stored for the persons to whom they are addressed. A railroad company, in delivering goods, is bound to take care that they are delivered to the proper parties, and it is no excuse for a wrong delivery that it was made through mistake, or because the railroad was deceived by the statements of third parties, who claimed the goods. And the court, therefore, instructs the jury that, of itself, it is no defense to the railroad in this case that Beach & Sutherland represented to them that the machines in question were intended for them, and that the marks on the

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boxes were put thereon merely to distinguish the shipments, if such representations were untrue in point of fact."

2. "It is the duty of a railroad company, where goods are safely conveyed to the place of destination, and the persons to whom they are directed are absent or cannot be found, either to hold said goods or to have them stored in some safe place for the owner, and in this case the mere fact that the several consignees named in the freight bills of these machines were not and did not intend to be in Memphis upon the arrival of the goods at that place, did not, of itself, justify defendant in disregarding the names and marks upon the boxes, or delivering them to third parties."

3. "The mere fact that the machines in question were shipped to Memphis on the order of Beach & Sutherland, as purchasers, did not entitle them to their possession on arrival, if the goods were consigned to other names for the purpose of preventing said Beach & Sutherland from getting them, until they had paid the drafts drawn against them, or obtained from the bank the papers authorizing their delivery."

4. "The delivery of the machines in question to Beach & Sutherland immediately on their arrival in Memphis was not warranted or authorized by the marks and directions upon the boxes, and in order to justify said delivery it devolves upon the defendant to prove to the satisfaction of the jury, either that it was plaintiff's intention, notwithstanding said directions and marks, that said Beach & Sutherland should get the goods on merely paying the freight charges on the same, or else that plaintiff induced defendant to believe that such was its intention; and the defendant is not excused for delivering the goods to Beach & Sutherland through mistake, unless it appears that plaintiff caused the mistake in some way. If, therefore, the jury believe that defendant was imposed upon by Beach & Sutherland, and acted merely on what they said, and had no other knowledge of plaintiff's intentions, except as

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they were expressed by the marks upon the way bills and boxes, then it made the delivery at its peril; and if, in fact, Beach & Sutherland were not to have the machines, without presenting the bills of lading or orders from the bank, then said delivery was wrongful."

5. "It makes no difference in this case, as far as the liability of defendant is concerned, what information the plaintiff had from Beach & Sutherland as to their reception of machines from time to time, unless defendant also knew, or was induced by the conduct of plaintiff to believe, that plaintiff had such information, and was thereby misled into supposing that plaintiff approved this manner of delivering the goods."

6. "The mere fact that the plaintiff knew that Beach & Sutherland were getting possession of machines consigned to Memphis to the names of third parties, before paying the drafts drawn against the shipments, cannot avail defendant, unless it further appears that plaintiff knew that the machines were being delivered by the railroad without presentation of the bills of lading or orders on the freight agent, and under a mistaken impression on the part of the railroad company that such delivery was in accordance with plaintiff's intentions."

7. "The mere fact that plaintiff, after it discovered that defendant had delivered the machines in question to Beach & Sutherland on their arrival in Memphis, attempted to collect the price of the same from said firm, is and was not sufficient to constitute a ratification of the acts of defendant in so delivering said goods, unless plaintiff intended thereby to waive its claim against defendant for an improper delivery, and to treat the said delivery as having no relation to the delay or default of said Beach & Sutherland in paying for said machines."

8. "There are five counts in the petition, covering five different consignments of machines, and the jury will have to find a verdict on each count separately. If, therefore, they find for the plaintiff on any or all of the counts,

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they will assess its damages separately on each count on which they so find, and will estimate the damages at such sum as they shall find, from all the evidence in the case, is equal to the actual market value of the machines in Memphis at the time of their delivery to Beach & Sutherland, and they may add interest on such sum at the rate of six per cent from the time of such delivery."

And the following instructions were given at the request of defendant: 1. "If at the time the defendant received from the plaintiff the goods mentioned in the several counts of the petition for transportation, it was the understanding of the plaintiff and defendant that said goods were to be delivered on their arrival in Memphis to said Beach & Sutherland, the verdict of the jury should be for the defendant."

2. "If Beach & Sutherland ordered and purchased from the plaintiff the goods in the several counts of the petition mentioned, on credit, and at the time of the shipment of said goods by the plaintiff, it was the understanding between the plaintiff and said Beach & Sutherland, that said goods should on their arrival in Memphis, irrespective of the payment of the purchase price thereof, be delivered to said Beach & Sutherland, in that case, the verdict of the jury should be for defendant"

3. "Although, as between the plaintiff and said Beach & Sutherland, the latter were not authorized to have or receive the goods mentioned in the several counts of the petition, until they had first paid the purchase price thereof, yet, if at the time defendant received said goods from the plaintiff for transportation, the defendant was ignorant of said Beach & Sutherland's said want of authority, and was resting under the belief, caused by acts or conduct of the plaintiff, that said Beach & Sutherland had authority from the plaintiff to receive said goods on their arrival in Memphis, and if, at the time the plaintiff so delivered said goods to the defendant, the plaintiff was aware of the defendant's said belief, but failed and neglected to disabuse the defend-

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ant of its said error, the plaintiff is estopped to complain that the delivery to said Beach & Sutherland was a wrong delivery, and the verdict should be for defendant."

The following instruction, asked by defendant, the court refused to give: 4. "If the jury believe from the evidence that when the machines received from the plaintiff for transportation reached Memphis, the consignees were non-residents of Tennessee, and did not expect to be in Memphis to receive said shipments; that the defendant thereupon delivered said goods to Beach & Sutherland; that said Beach & Sutherland were either the general agents of plaintiff or were permitted by plaintiff to hold themselves out as such, then they will find for the defendant."

The jury found a verdict for plaintiff on all the counts of the petition, and assessed the total damages at \$5,033, which was the value of the goods as billed to Beach & Sutherland, without interest. The usual motions for new trial and in arrest of judgment were made and overruled, and defendant appealed to the St. Louis court of appeals, where the judgment was reversed.

In regard to the excluded evidence of Mr. Beach, it may be sufficient to say that its exclusion or admission was of no consequence, since the same point was virtually decided by the court in refusing the defendant's last instruction, and in giving all that were asked by plaintiff. There was abundant evidence to show that Beach & Sutherland held themselves out to the world as general agents of plaintiff, and with the consent of plaintiff, and that they were, in fact, general agents, in a certain sense, of plaintiff. For instance, Mr. Beach produced a copy of a letter-head, which the plaintiff had printed in Cleveland, for the firm of Beach & Sutherland, at the expense of said firm, reading thus: "Office of Beach & Sutherland, General Agents, Wilson Sewing Machines, 393 Main street, Memphis, Tenn." Now, if the fact that Beach & Sutherland were general agents of plain-

1. CONSIGNEE NON-
RESIDENT AT POINT
OF DELIVERY: de-
livery to consign-
or's agent.

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tiff would justify the railroad company in delivering to them goods consigned, not to the "Wilson Sewing Machine Company," but to Thomas Kendall, then the instructions of the plaintiff are manifestly wrong, and the refusal of the last one offered by the defendant was erroneous. But it is not seriously contended that this is the law, or that a delivery to an agent of the consignor would be a compliance with the duty of the carrier. The carrier was authorized to deliver to the consignee or his order, but that gave no authority for a delivery to the general agents of the consignor. To say nothing of the cumulative character of the testimony, it had nothing to do with the defense set up, and its exclusion or admission was of no importance.

The two first instructions for plaintiff are objected to, as calculated to confuse and mislead the jury, because, as

2. INSTRUCTIONS. we understand the objection, the hypothesis of an establishment of the defense relied on, of an agreement to which plaintiff was a party or privy, is not stated as an exception to the general proposition stated in the instruction. These exceptions are clearly stated in the instructions given for defendant, in which the jury are told that, if the goods were delivered not in conformity to the law, as stated in the first instruction of plaintiff, by reason of an understanding to that effect between plaintiff and defendant, or between plaintiff and Beach & Sutherland, or although without any such understanding between either, was yet caused by acts or conduct of the plaintiff which misled the defendant, they would find for the defendant. The exception, then, to the first, and, indeed, all the instructions for plaintiff, was given, but in separate instructions, and the objection resolves itself into the proposition that the general rule and the exceptions must all be stated in a single instruction. It was not unusual formerly for judges presiding at the trial of cases by juries to give what was called a charge or instruction upon the whole law of the case, couched in such terms as the judge preferred, but as business multiplied and time became important, such

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investigations and conclusions, written out by the presiding judge, are dispensed with, and the counsel on either side are expected to prepare their respective views of the law applicable to the case, and the court merely selects such offered on either side as he thinks sufficient and appropriate. All such as are given are presumed to be examined and read by the jury, and, if they are inconsistent with each other, and contradictory, error is of course committed, but if they are not so, and altogether lay down the law correctly, there is no ground for complaint. Such has been the uniform decision of this court.

The additional objection to these two instructions, that they referred to two facts not at all disputed, and having no connection with the defense set up, and were therefore calculated to mislead the jury, is certainly a singular one, looking at the instructions for defendant and the manifest object of the testimony in regard to the absence of Kendall and the other consignees from Memphis, and that they had on intention whatever to be in Memphis to receive the goods, and that Beach & Sutherland represented to defendant that these marks on the boxes were merely intended to distinguish the shipments. These two facts were prominent and leading ones, which, in connection with others, were relied on by defendant to establish their defense under the instructions given for them. It was necessary, therefore, for the court to instruct the jury in regard to them; and, whether necessary or not, if the law was correctly expounded in the instructions, it cannot be said that they were outside of the case.

The verbal criticisms upon the instructions we think it unnecessary particularly to discuss. The instructions are all copied in this opinion, and it will be seen, I think, upon perusal, that they are, upon the whole, such an exposition of the law of the case as could not be misunderstood by an intelligent jury. That they were not misled and did not misunderstand, is shown by their verdict, which was obviously for the right party. That they re-

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fused to give interest, only shows that they sympathized with defendant for a loss occasioned by the carelessness of employees, and were not disposed to give the plaintiff any more than, under the instructions and evidence, they were obliged to give. The proofs in regard to the answer of Beach when an explanation was asked of him of the marks on the boxes, consigning them to various strangers, show that the attention of the employees was called to the subject, and a gross degree of carelessness in remaining satisfied with such an explanation as was given.

It is not thought necessary to discuss the propositions of law contained in the instructions, or cite authorities in support of them, because no point is made in this court on that subject. They are to be found cited in the brief of the plaintiff's counsel. It seems quite certain that if the law is not as stated in these instructions, then such arrangements as were proved in this case to have been made, would be perfectly futile to secure the object in view, which was the same with some modifications as are usually obtained by the C. O. D. mark so frequently used in single shipments of small amount. The caution of the plaintiff seems to have been singularly explicit and minute to prevent the delivery of these goods to Beach & Sutherland. The superscription on each box, "to be delivered to the consignee only or his written order," may be stricken out, and the law is the same.

The instructions for the defendant were exceedingly favorable to him. There was certainly no evidence of any direct communication between the plaintiff and defendant on this point or any other, except the marks on the packages, and none, if any, communication between plaintiff and Beach & Sutherland on this subject, though letters between them are produced. Yet the court went further and allowed the jury to find for defendant, if "the acts or conduct of plaintiff" could lead them to an inference that the goods were really intended to be delivered to Beach & Sutherland. The instructions are undoubtedly correct, yet

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there would have been some plausibility in objections from the plaintiff on the ground of want of evidence to justify them.

Upon the whole, all the judges (except NORTON, J., who did not sit in the case) concur that the judgment of the circuit court was right, and consequently that of the court of appeals must be reversed, which is done accordingly.

SMITH V. CHAPMAN, *Appellant*.

Justice of the Peace: POWER TO AMEND TRANSCRIPT. A justice of the peace has no power to file an amended transcript for appeal without an order of the circuit court. Such order should distinctly specify the amendment to be made; and any amendment not directed by the order will be void and without effect.

Appeal from Butler Circuit Court.—HON. R. P. OWEN,
Judge.

REVERSED.

Stephen M. Chapman p. p. and E. Y. Mitchell for appellant.

HOUGH, J.—This was a suit by attachment against the defendant Dyer, originally brought before a justice of the peace. Judgment was rendered against the defendant Chapman, as garnishee, and he appealed to the circuit court. The transcript filed by the justice in the office of the clerk of the circuit court, in pursuance of the appeal, failed to show that any judgment had ever been rendered by the justice against the defendant Dyer, or that said defendant had ever been duly notified of the proceedings against him. An amended transcript was subsequently filed in the circuit court, from which it appeared that judgment was rendered by the justice against the defendant Dyer, and that he had been notified according to law. The

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cause was tried by the circuit court, and judgment was again rendered against the defendant Chapman. The justice had no authority to amend his transcript, except in pursuance of an order of the circuit court. *Norton v. Porter*, 63 Mo. 345. The only order made by the circuit court in relation to the transcript was one which required the justice to make proper entries on his docket as to proof of publication, if such proof was made before him, and to transmit a certified copy of the same to the circuit court. No authority whatever appears for amending the transcript so as to show a judgment against the defendant Dyer. When proceedings have been had before a justice, or official action has been taken by him, which should have been entered in his docket, but which he omitted to enter at the proper time, he has no power to remedy the omission. *Norton v. Porter, supra*. The proper course in such cases is to proceed under section 3049 of the Revised Statutes, unless both parties consent to an amendment. If it be made to appear to the circuit court that such omission has occurred, that court may direct the justice to make the necessary corrections, and the order of the circuit court should state the facts upon which it is based, and should distinctly specify the entry to be made. As there could be no judgment against the garnishee until judgment was rendered against the defendant in attachment, and as the transcript showing such judgment was made without authority of law, the judgment will be reversed and the cause remanded. All concur.

THE STATE V. SHARP, *Appellant*.

1. **Murder; DELIBERATION.** The trial court, in defining the crime of murder in the first degree, charged that, "deliberately means intentionally, purposely, considerably; therefore, if the defendant formed a design to kill, and was conscious of such purpose, it was deliberate." *Held*, error.
2. **Variance.** A variance between the true name of the deceased

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and the name as given in an indictment for his murder, will not prevent conviction unless the trial court finds it to be material to the merits of the case and prejudicial to the defense.

Appeal from Nodaway Circuit Court.—HON. H. S. KELLEY,
Judge.

REVERSED.

Beech & Lane for appellant.

J. L. Smith, Attorney-General, for the State.

SHERWOOD, C. J.—I. The defendant was indicted for the crime of murder in the first degree; the name of the person on whom the murder was alleged in the indictment to have been perpetrated, was "Martin Edward Hogan." On trial had the jury by their verdict found the defendant guilty of murder in the first degree, and he was thereupon sentenced in conformity to the verdict.

We shall enter on no discussion of the testimony, as to the degree of homicide which it establishes, as we regard a fatal error as having been committed in the giving by the court, of its own motion, the second instruction on behalf of the State. That instruction is as follows: "Willfully means intentionally, and not accidentally; therefore, if the defendant intended to kill, such intention was willful. Deliberately means intentionally, purposely, considerately; therefore, if the defendant formed a design to kill, and was conscious of such a purpose, it was deliberate. Premeditatedly means thought of beforehand, for any length of time, however short; and malice signifies a condition of the mind, an unlawful intention to kill, or do some great bodily harm to another, without just cause or excuse. Aforethought means thought of beforehand, for any length of time, however short." This instruction is clearly faulty, in that it does not correctly define the word "deliberately." To constitute murder in the first degree, there must concur willfulness, delibera-

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tion, premeditation and malice aforethought. The first instruction clearly stated in general terms what was necessary to constitute the crime of murder in the first degree, but the terms used in that instruction needed to be explained, so that the jury might fully understand their true import. This explanation of the words used in the first instruction was attempted in the second instruction, but with a signal lack of satisfactory results. "Deliberately" is said to mean that which is done in a cool state of the blood. A homicide may be thought of beforehand—that is premeditated and intentionally done—and still, if the element of deliberation be lacking, the homicidal act will be only murder in the second degree; so that it will be readily seen that "deliberately" does not, as defined in the objectionable instruction, mean intentionally or purposely done; otherwise, every act of intentional killing, done with premeditation and malice, would carry with it the element of deliberation, and amount to murder in the first degree, for it is held that "all intentional homicides committed with premeditation and malice, but without deliberation, must be murder in the second degree," and that "murder in the second degree is such a homicide as would have been murder in the first degree if committed deliberately."

And we do not regard the definition of the word "deliberately" as made any clearer by the words which follow the word "purposely" in the same clause. Even if we grant that the word "considerately" is a synonym of "deliberately," still "considerately" is not defined, and the jury were as much in the dark as if the word being defined had been merely repeated in the explanatory sentence. Nor do we think the matter is helped by the addition of the words that, "if the defendant formed a design to kill, and was conscious of such a purpose, it was deliberate," because every intentional killing, a killing with premeditation, as above seen, only makes murder in the second degree; and it is impossible to conceive of such a killing unaccompanied by a previously formed design to kill, or

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of the forming of such a design, without a consciousness of its purpose. Thus the jury were in effect told that deliberation was an ingredient of murder in the second degree, and that, therefore, there was no distinction between the two degrees of murder. Had the jury been told that "deliberately" meant in a cool state of the blood, and that if in such a state of the blood the defendant formed a design to kill, the act would have been deliberate, the instruction taken as a whole, and in connection with its other definitions, would perhaps have been unobjectionable. As it is, we cannot give it our sanction. The foregoing views are fully supported by the cases of *State v. Wieners*, 66 Mo. 12, and *State v. Curtis*, 70 Mo. 594.

II. In relation to the point that there was a variance between the name of the deceased, and that mentioned in 2. VARIANCE. the indictment, it suffices to say that such variance is immaterial, unless the trial court finds it "material to the merits of the case, and prejudicial to the defense of the defendant." There has been no such finding in the case. R. S. 1879, p. 307, § 1820; *State v. Wammack*, 70 Mo. 410. Judgment reversed and cause remanded. All concur, except NORTON, J., who dissents.

THORNTON *et al.*, Plaintiffs in Error, v. THE NATIONAL EXCHANGE BANK.

1. **National Banks:** POWER TO AVAIL THEMSELVES OF REAL ESTATE SECURITY. If a National bank discounts a note secured by deed of trust on real estate, the security passes to and may be enforced by the bank. The transaction is a violation of section 5137 of the National banking act; but neither the borrower nor a creditor of the borrower can avail himself of that fact. The only penalty to which the bank is liable is forfeiture of its charter, and that penalty can be invoked only by the sovereign, the United States.
2. **Contract:** ASSUMPTION OF ANOTHER'S OBLIGATION: FAILURE OF CONSIDERATION. At a foreclosure of a deed of trust upon a leasehold interest executed by an association to secure its debts, B & T be-

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came the purchasers. As payment of the purchase money they assumed the debt, and by way of indemnity to certain persons who were sureties of the association, they executed a mortgage in their favor. At the time this transaction took place the leased property was subject to a deed of trust which was subsequently foreclosed, whereby the leasehold interest was extinguished. B & T bought with knowledge of this deed of trust and without warranty of title to the leasehold, and no fraud or deceit was practiced on them. *Held*, that as between them and the sureties whom they had indemnified the liability of the latter had not been revived, and they had a right to claim the benefit of the mortgage B & T had given them.

3. **Deed: HUSBAND AND WIFE.** Where husband and wife are named at the commencement of a deed as parties of the first part, and afterward the parties of the first part are named as grantors, the instrument is the deed of both husband and wife.
4. ———: ———: **CERTIFICATE OF ACKNOWLEDGMENT.** Where a certificate of acknowledgment of a deed executed by husband and wife to convey lands of the wife, states that the wife, upon separate examination, acknowledged that she executed the deed and relinquished her dower in the lands, the deed will pass her fee simple interest. (Following *Chaurin v. Wagner*, 18 Mo. 546, and other cases.)
5. **Principal and Surety: SECURITIES TAKEN BY SURETY.** It is well settled that securities taken by sureties for their indemnity, inure to the benefit of the creditor, and he may resort to them for satisfaction of his debt.
6. **Deed of Trust: TENDER OF DEBT DISCHARGES LIEN.** Where two deeds of trust were given to secure several notes, all of which were held by different persons, and it was provided in each deed that if the grantor should pay one-half of the debt and interest expressed in the notes, the deed should become void, and the grantor in one of the deeds tendered to the holder one-half of his note and interest, and the holder refused the tender; *Held*, that as to that note the lien of the deed of trust was discharged.

Error to Callaway Circuit Court.—HON. G. H. BURCKHARTT,
Judge.

REVERSED.

Mary O. Thornton and Amos B. Thornton sued Bragg by attachment, and among others garnished the National Exchange Bank as the holder of a note for \$4,744.50 made by one Lamkin. Lamkin had bought a property known as "Bragg's Hall," at trustee's sale, and in payment of his

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bid had made this note to the trustee, Miller, who had assigned it to the National Exchange Bank, who claimed to hold, as to \$1,000 of the amount, for the benefit of the First National Bank, and as to the remainder, for itself, and filed an interplea setting up this claim. "Bragg's Hall" had been the joint property of Bragg and Mary O. Thornton, and plaintiff's attachment was laid on the theory that the deed of trust to Miller was given to secure a National bank for a present advance of money and was, therefore, void under the National banking act, and hence, one-half of the proceeds of the sale by Miller belonged to Bragg, and was liable to attachment for his debt. As to the other half for the same reason they claimed it as the property of Mary O. Thornton. Plaintiffs obtained judgment against Bragg, but upon a trial of the interplea filed by the National Exchange Bank there was a judgment for the interpleader, to reverse which plaintiffs took this writ of error. Other facts appear in the opinion of the court.

Nathan C. Kouns for plaintiffs in error.

1. The National Exchange Bank took nothing by the indorsement of the notes to it but Bragg's note with Ewing's indorsement, and the lien of the deed of trust was lost. U. S. Rev. Stat., p. 998, §§ 5137, 5136; *Matthews v. Skinker*, 62 Mo. 329; *Woods v. People's National Bank*, 83 Penn. St. 57. If it were true, as claimed by the bank, that the Miller deed of trust was given to indemnify Ewing against his indorsement, the bank would still have no equity to enforce it nor any right to claim the benefit of it. The doctrine that a creditor may resort to securities made for the protection of the debtor's surety (*Burnside v. Fetzner*, 63 Mo. 107) cannot be invoked. *Aequitas sequitur legem*, and does not seek to abrogate or evade statutes, nor relieve against a general rule of law. (Willard 318, 41.) Nor can a court of equity lend its aid to enforce a security, which is, as to the creditor, an illegal contract,

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nor aid the creditor to make his debt out of an illegal security in contravention of public policy, or of a statute. *Downing v. Ringer*, 7 Mo. 585; *Bank of Mo. v. Bank of Baltimore*, 10 Mo. 125; *Bank v. Clark*, 4 Mo. 59; *Griffith v. Bank*, 4 Mo. 255; *Riley v. Jordan*, 122 Mass. 231; s. c., 5 Cent. Law Jour. 120.

2. The equity of plaintiffs grows out of three considerations: *First*, That there is no creditor before the court claiming the fund that has legal capacity and right to receive it: (1 Story, Eq. Jur. 27, 28, 53.) *Second*, That Mrs. Thornton, having paid the purchase money "prematurely," i. e. before getting a title, has a lien on the property and on the proceeds of the sale of it. (*Stewart v. Wood*, 63 Mo. 252,) and: *Third*, That by the deed of Bragg and wife to her, of May 5th, 1874, she became the legal representative of the grantors therein, and as such entitled to receive all of the proceeds of the sale under a prior deed of trust, which do not legally go to some other party before the court. *Reid v. Mullins*, 43 Mo. 307; s. c., 48 Mo. 344; *Warner v. Veitch*, 2 Mo. App. 459.

3. The deed of trust executed by Mrs. Thornton and her husband did not create any lien either at law or in equity upon her estate. *Shroyer v. Nickell*, 55 Mo. 264; *Whiteley v. Stewart*, 63 Mo. 360. At the date of the deed her husband had a fifteen year lease on the third story of the building in which she had a right of dower, and her relinquishment of dower must be understood as applying to that, notwithstanding the description in the deed was of the entire property.

4. The tender made by plaintiffs discharged the lien of the deed of trust as against Mrs. Thornton's interest in the property. 1 Hilliard on Mortgages, 269; *Whelan v. Reilly*, 61 Mo. 570; 3 Southern Law Review, 712, 767.

The consideration for the assumption by Thornton and Bragg of the obligation of Berry, Crow and A. W. Ewing having failed by the extinguishment of the lease by the sale under the Miller deed of trust, these parties are

remitted to their original positions, and the liability of Berry, Crow and A. W. Ewing as sureties is revived.

Ewing & Pope for respondents.

1. The proceeds of the sale should be applied as asked by the interpleader. *Helweg v. Heitcamp*, 20 Mo. 569.

2. This is not an effort, or a proceeding by a National bank, to enforce a debt due and secured by a deed of trust to the bank, but is a controversy over money, arising from a sale under deed of trust, given to indemnify sureties. This case is not similar to *Matthews v. Skinker*, 62 Mo. 329. The claim of plaintiffs is an audacious effort by debtors to defeat their sureties on the pretext that ultimately the money is to go to a National bank. If the bank does not get its money out of this fund it will recover it from the sureties. They will be unable to get it back from Bragg's estate or the Thorntons, for they are both insolvent; and thus if plaintiffs succeed here they will have wrested from their sureties through a court of justice the proceeds of the very property which they conveyed as indemnity for their sureties.

3. Bragg and Mary O. Thornton owned Bragg Hall as tenants in common. Bragg and A. B. Thornton owed certain debts, evidenced by notes. To secure these notes Bragg and wife, and Thornton and wife, executed in due form of law, and delivered their deeds of trust. A sale is had under a prior deed of trust, and the Thorntons insist that the surplus must be paid to them as general creditors of Bragg and not to extinguish Thornton's own debt. There is no equity in this.

4. The deed of trust of Thornton and wife conveyed the interest of Mrs. Thornton. *Schneider v. Staihr*, 20 Mo. 269; *Shroyer v. Nickell*, 55 Mo. 264; *Whiteley v. Stewart*, 63 Mo. 260; *Kinner v. Walsh*, 44 Mo. 65; *Brown v. Brown*, 47 Mo. 130; *Siemers v. Kleeburg*, 56 Mo. 196; *McQuie v. Peay*, 58 Mo. 56.

PER CURIAM.—This was a suit by attachment instituted in the Cole circuit court against Charles G. Guenther, administrator of the estate of Henry Bragg, deceased, in which the National Exchange Bank and the other parties to the cause were summoned as garnishees. A change of venue was taken to the Callaway circuit court.

On the 21st day of March, 1874, said Bragg executed and delivered to H. Clay Ewing two promissory notes, one for \$2,300, and the other for \$700 payable three months thereafter to H. Clay Ewing at the First National Bank, Jefferson City. On the same day, said Bragg and wife conveyed to P. T. Miller in trust to secure said notes, property in Jefferson City, known as "Bragg's Hall," and on the same day Ewing indorsed said notes to the National Exchange Bank, a corporation organized under the act of Congress in relation to National banks. On the 5th day of May, 1874, said Bragg and wife conveyed to Mary O. Thornton, by deed of that date, one undivided half of said property for the consideration of \$7,000, expressly subject to said deed of trust. On the 25th day of February, 1875, said Mary O. Thornton and her husband, A. B. Thornton, and Henry Bragg and wife conveyed said property to H. Clay Ewing in trust, to indemnify the sureties of said Henry Bragg and Amos B. Thornton, in their notes, one to the National Exchange Bank for \$592; one to Sarah A. Chiles for \$556.75, and one to the First National Bank of Jefferson for \$1,000. The note to Mrs. Chiles was afterward paid. J. R. Crow and A. W. Ewing were sureties on the notes to Mrs. Chiles and the National Exchange Bank, and together with Green C. Berry, were sureties on the note to the First National Bank. These notes bore date 3rd day of February, 1875. The suit of Thornton and wife by attachment against Bragg's administrator was substantially for a breach of covenant in the deed from Bragg to Mrs. Thornton, and by garnishment, they seek to subject the proceeds of the sale of the "Bragg

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Hall" property by P. T. Miller, trustee, in the first described deed of trust, to the payment of the judgment recovered by them against Bragg's administrator. That judgment has not been appealed from, and we have only to consider the proceedings in the garnishment cases, from the judgment in which Thornton and wife have appealed to this court. At the sale of said property by P. T. Miller, as trustee, May 22nd, 1875, one Lamkin became the purchaser at the price of \$4,744.50, for which he executed his note to said trustee, who on the same day assigned it to the National Exchange Bank for the benefit of that bank and the holders of the notes described in the deed of trust of February 25th, 1875. The garnishments were served after the sale of the property, and after the assignment of the Lamkin note to the bank.

By the assignment of the notes of Bragg to the National Exchange Bank by H. Clay Ewing, the deed of trust passed to the bank, and as the execution of the notes and the deed of trust and the advancement of the money thereon by the bank were contemporaneous acts, the transaction was a violation of section 28 of the act of Congress, which provides as follows: "It shall be lawful for any such association to purchase, hold and convey real estate as follows: *First*, Such as shall be necessary for its immediate accommodation in the transaction of its business; *Second*, Such as shall be mortgaged to it in good faith by way of security for debts previously contracted; *Third*, Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; *Fourth*, Such as it shall purchase on sales under judgments, decrees or mortgages held by such association, or shall purchase to secure debts due to said association. Such association shall not purchase or hold real estate in any other case or for any other purpose than those specified in this section, nor shall it hold the possession of any real estate under mortgage, or hold the

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title and possession of any real estate purchased to secure any debt due to it for a longer period than five years."

The transaction betwixt Ewing, Bragg and the bank was the consummation of a loan by the bank to Bragg, and Ewing was not an accommodation indorser. Conceding, as it is claimed, that it was a violation of the foregoing section of National bank law, would the court, in a proceeding by these plaintiffs for that purpose, have annulled the mortgage? We are aware that in the case of *Matthews v. Skinker*, 62 Mo. 329, this court enjoined the sale of trust property and held the deed of trust void in a similar transaction to that between Ewing, Bragg and the bank. The judgment, however, in that case was on appeal to the Supreme Court of the United States reversed, the court holding that the deed of trust was not void, and that it was error to enjoin the trustee from selling thereunder, and that while the law authorizing the establishment of National banks, prohibits them when established from lending money on real estate security, yet if loans are made on such securities they are not void, but may be enforced. It was also held that a person borrowing money on such security could not interpose the statutory prohibition as a defense in a proceeding to enforce it, the court using the following language: "We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded by giving success to this defense whenever the offensive act shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress. That has always been the punishment prescribed for a wanton violation of a charter, and, it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot directly or indirectly usurp this function of the government." 98 U. S. 621, *sub nom.*, *National Bank v. Matthews*.

The same doctrine is enunciated in the following cases :

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Leazure v. Hillegas, 7 Serg. & Raw. 320; *Goundie v. The North. Water Co.*, 7 Barr 233; *Silver Lake Bank v. North*, 4 John. Chy. 370; *McIndoe v. City of St. Louis*, 10 Mo. 577; *Chambers v. City of St. Louis*, 29 Mo. 543; *Land v. Coffman*, 50 Mo. 243; *Runyan v. Coster*, 14 Pet. 122; *Wroten's Assignee v. Armat*, 7 Reporter 797. We have been cited to cases decided by several State courts, giving a different construction to the act of Congress in question from that put upon it by the Supreme Court of the United States in the case of *Matthews v. Skinker*. We cannot, however, follow them, being bound by the decision of the latter court, the peculiar province of which is to determine all questions involving a construction of the laws of Congress. Adopting that construction, we are of the opinion that plaintiffs, as creditors of Bragg, can assert no claim in the garnishment proceedings to the proceeds of the sale of the mortgaged property so far as they have been applied to the payment of the notes held by the National Exchange Bank and indorsed by H. C. Ewing.

A large surplus of the proceeds of the sale of the Bragg Hall property remains after the payment of said demand, which is claimed by plaintiffs and also by the beneficiaries in the deed of trust executed by plaintiffs and by Bragg and wife, and the only question left is as to its disposition.

The deeds of trust executed by Bragg and wife and Thornton and wife were made to indemnify the sureties on the notes mentioned, Ewing, Crow and Berry. It was alleged and proved that said debts were contracted before the date of the notes, for furnishing and finishing the third story of "Bragg's Hall," and that the sureties were bound for said debts, before Thornton and Bragg assumed them; that said sureties were agents or trustees of an association which had taken a fifteen-year lease from Bragg on the third story of the hall; that they executed a deed of trust conveying said interest to one Lamkin to secure said indebtedness; that

2. CONTRACT: assumption of another's obligation: failure of consideration.

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Lamkin advertised the same for sale under the deed of trust and by arrangement of all the parties, Bragg and Thornton purchased said interest and assumed the debts for which the trust deed was executed, and that this was the only consideration for their assumption of said indebtedness. Because the lease was extinguished by the sale under the deed of trust to P. T. Miller it is contended the sureties again became bound as principals for the said debts.

Upon what principle such a result is predicated we are unable to perceive. No deceit or fraud was alleged against the sureties. Bragg and Thornton were aware of the existence of the deed of trust when they purchased the lease. Mrs. Thornton also knew of its existence, for it was expressly mentioned in the deed from Bragg and wife, conveying to her one undivided half of the premises. There was no warranty of the title acquired by Bragg and Thornton to the leasehold interest, and no obligation express or implied that if the lease should be extinguished by a sale under the deed of trust the sureties would be responsible for the debts assumed by Bragg and Thornton. The consideration they received for assuming the debt, was the fifteen-year lease, which they took subject to the deed of trust, and, therefore, took the risk of an extinguishment of the lease by a sale under the deed of trust.

Nor were these sureties affected or bound by the equities between Bragg and Mrs. Thornton in regard to the agreement of Bragg with her to apply the proceeds of certain notes assigned to him by her to the debt secured by said deed of trust. These notes were assigned to him as part payment of the money she was to pay for one-half of the "Bragg Hall" property, and he agreed with her to apply the proceeds in payment of said \$3,000 indebtedness to the National Exchange Bank.

It is also urged by Thornton and wife that the deed of trust executed by them to indemnify the sureties, did not

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3. DEED: husband convey her interest in "Bragg Hall," because
and wife. in the acknowledgment it was stated that she
relinquished her dower, and her name does not appear in
the body of the deed, as a grantor therein. And *Shroyer*
v. Nickell, 55 Mo. 264, and *Whiteley v. Stewart*, 63 Mo. 360,
are cited as sustaining that view. In the body of the deed
she is named as one of the parties of the first part, and
the parties of the first part are named as the grantors.
Shroyer v. Nickell, was a case in which an equitable defense
to an action of ejectment was pleaded, and the facts
relied upon were that Shroyer and wife had, by mistake,
made a conveyance of another tract, intending to convey
the land in dispute, and defendant asked a reformation of
the deed against the wife. The court decided that as the
property was not separate property of Mrs. Shroyer this
could not be done, and the case has no bearing upon the
question. In *Whiteley v. Stewart* the commencement of
the deed named Whiteley and wife as parties of the first
part, but in the body of the deed, the husband alone was
named as grantor and the name of the wife did not again
appear except in their signatures to the deed. The court
expressly held that the deed showed upon its face that she
never granted the land, but her husband was sole grantor.

In *McDaniel v. Priest*, 12 Mo. 545, it was decided that
"where a certificate of acknowledgment upon a deed exe-
cuted by husband and wife to convey lands
4. — : — : certificate of ac-
knowledge- of the wife, stated that the wife upon separ-
ate examination acknowledged that she executed the deed
and relinquished her dower in the lands mentioned in the
deed," the deed would not pass a fee simple interest of the
wife. But in *Chauvin v. Wagner*, 18 Mo. 546, this case was
overruled, and *Chauvin v. Wagner* has been followed in
Delassus v. Poston, 19 Mo. 425; *Thomas v. Meier*, 18 Mo.
573; *Perkins v. Carter*, 20 Mo. 465, and *Thomas v. Hesse*, 34
Mo. 13.

Plaintiffs in error rely upon the doctrine that "a se-
curity will be subrogated to the rights of the creditor upon

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SURETY: SECURITIES
taken by sure-
ty.

paying his principal's debt, and not until then." And their counsel quotes with emphasis the language of the court, in *Hearne v. Keath*, 63 Mo. 84, to the effect that the principal does not become a debtor to the surety, until the latter has paid the debt, "and until then his demand has no existence." There can be no doubt of that proposition, but it is equally well settled that securities taken by the sureties for their indemnity inure to the benefit of the creditor, who may resort to them for the satisfaction of his debt. Here the creditors ask to be subrogated to the rights of the sureties' a very different case from that considered in *Hearne v. Keath*.

The deeds of trust executed by Bragg and wife and Thornton and wife of even date were made, one by Bragg and wife conveying the "Bragg Hall" property, and the other by Thornton and wife conveying the same property, Bragg and Mrs. Thornton being each the owner of an undivided half, and it was a stipulation in each of said deeds, that if the parties of the first part paid one-half of the debt and interest expressed in said notes and every part thereof, when the same became due, the deed should become void, &c. Each of the notes was held by and made payable to different persons. The National Exchange Bank held one. There was no connection of one with the others, or with either of the others, except in the deeds of trust. The holder of neither note had any interest in the payment of the others. A. B. Thornton, one of the debtors, at their maturity, tendered to the National Exchange Bank one-half of the notes that bank held against him and Bragg, and the bank refused to accept it, insisting upon payment of the whole amount. Mrs. Thornton conveyed her property to secure that half. She is, therefore, as to that, to be treated in some respects as a surety, though not personally bound for any part of the debt, and the refusal of the bank to accept the money so tendered, extinguished the bank's lien on her

6. DEED OF TRUST:
tender of debt dis-
charges lien.

Ex Parte Claunch.

property to that amount. *Olmstead v. Tarsney*, 69 Mo. 396; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553. A fair construction of the deeds authorizes either of the debtors to pay one-half of either of the notes secured by the deed of trust, without being compelled to pay the other half, although both were jointly bound for the whole amount. While as between Thornton and the bank, the latter had the right to refuse to accept a portion of its debt, as betwixt Mrs. Thornton and the bank it had no such right.

After the payment of the note and interest secured by the deed of trust to Miller and the costs and expenses of executing that trust, and payment of the note held by the First National Bank with interest, and one-half of the note held by the National Exchange Bank and interest, Mrs. Thornton is entitled to any balance that may remain, not exceeding the amount of the judgment in favor of Thornton and wife against Bragg's administrator. The judgment is reversed, and the case remanded, to be proceeded with in conformity with this opinion, HENRY, J., not sitting.

EX PARTE CLAUNCH.

1. **Justice's Court:** CRIMINAL PROCEDURE: PROSECUTING ATTORNEY. If a complaint filed with a justice of the peace, charging a felony, is, in the opinion of the prosecuting attorney, defective, that officer may dismiss the prosecution, and if he does, and an information is filed by the coroner against the same person for the same offense before another justice, the latter officer will have jurisdiction to make the preliminary examination and commit to jail.
2. **Bail in case of Homicide.** It is safe to refuse bail in a case of malicious homicide, when the judge would sustain a capital conviction, pronounced by a jury on evidence of guilt, such as that exhibited on the application to bail; and to allow bail when the prosecutor's evidence is of less efficacy; and this rule is especially applicable when the application is made to a court of last resort.

Ex Parte Claunch.

Habeas Corpus.

WRIT DENIED.

On the 29th day December, 1879, the petitioner, Burrill Claunch, killed William T. Brownlee, by shooting him with a shot-gun. On the next day he surrendered himself to T. B. Murray, a justice of the peace, before whom an affidavit was made charging him with the homicide. Thereupon Murray issued a warrant to constable Ramsey, under which Ramsey took Claunch into custody. Before any preliminary examination took place, the coroner of the county held an inquest on the body of Brownlee, and immediately filed an affidavit before O. D. Hawkins, a justice of the peace, charging Claunch with the crime of murder in the first degree. Hawkins, thereupon, issued a warrant for the arrest of Claunch, on which constable Tuttle arrested him while still in the custody of constable Ramsey, the latter delivering him up without objection. Tuttle brought Claunch before Esquire Hawkins, by whom he was examined and committed to jail without bail. On the same day on which the coroner filed his information, the prosecuting attorney wrote to Esquire Murray informing him of the steps taken by the coroner, and requesting that the proceedings then pending before him be dismissed. This Murray refused to do. The object of the present proceeding is to have Claunch remanded to the custody of constable Ramsey and admitted to bail.

E. A. Nickerson and Land & Sparks for petitioner.

J. L. Smith, Attorney-General, and *W. H. Brinker*, Prosecuting Attorney, *contra*.

SHERWOOD, C. J.—So far as concerns the question of the jurisdiction of the committing magistrate, Hawkins,

Ex Parte Claunch.

1. JUSTICE'S COURT: criminal procedure: prosecuting attorney. we experience no difficulty, regarding it as perfectly competent for the prosecuting attorney, as the representative of the State, to dismiss the prosecution commenced before Murray, as the affidavit filed before him was, in the opinion of the prosecuting attorney, defective in failing to charge murder in the first degree.

Besides, it was the duty of the coroner, upon inquisition found before him of the death of Brownlee, speedily to inform a justice of the peace of the finding of such inquisition, and the duty of that officer, upon the receipt of such information, "forthwith to issue his process for the apprehension of the criminal." R. S. 1879, p. 1011 § 5147. And the information of the coroner filed with Hawkins charged Claunch with murder in the first degree; a higher grade of offense than that specified in the affidavit filed before Murray.

2. BAIL IN CASE OF HOMICIDE. The point of admitting Claunch to bail, is one of more difficulty. The jury empaneled by the coroner, as well as the committing magistrate, have, after hearing the evidence, charged the petitioner with the highest grade of homicide known to the law. This case obviously differs from that of *Alexander*, 59 Mo. 598, for there two successive juries had, on an indictment charging murder in the first degree, failed to find a verdict sustaining the truth of that charge. This fact, coupled with others, that the prisoner had voluntarily surrendered himself, and failed to avail himself of opportunities to escape, were held sufficient to authorize his admission to bail. In such circumstances as just detailed, it might well be held that the proof of murder was not evident, nor the presumption thereof great, inasmuch as the juries empaneled to try the prisoner had twice refused to sanction the charge made by the indictment. Unless in a very plain case, it is an excessively embarrassing duty for a court of last resort, before whom the cause of the petitioner will, in all probability, come for ultimate determination, to be called upon

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to say whether the evidence adduced in the customary manner, in a mere preliminary examination before a justice of the peace—adduced for the sole purpose of showing probable cause for commitment, is sufficient to warrant the discharge of the accused on bail; for it is but too obvious that the duty imposed by such an application carries with it, or at least seems to do so, that of passing beforehand upon the merits of the petitioner's case, and that too, as here, before the case has been passed upon by the grand jury, or heard before a petit jury, where the proper influence and authority will be brought into successful action, to elicit in the clearest manner, all legitimate evidence having a bearing on the commission of the crime, the intent of the prisoner, and the consequent grade of his offense. It is said to be a safe rule "to refuse bail in a case of malicious homicide, where the judge would sustain a capital conviction, pronounced by a jury, on evidence of guilt, such as that exhibited on the application to bail; and to allow bail where the prosecutor's evidence is of less efficacy." *Commonwealth v. Keeper of the Prison*, 2 Ashm. 227; *Hurd Hab. Corp.*, 435. We incline to the opinion that the above is the proper test to apply and rule to follow, especially by a court of last resort. Viewing the matter of the petitioner's application in this light, we shall decline a discussion of the evidence adduced at the preliminary examination, further than to remark that in view of the threats indulged in by the petitioner, and his other acts prior to the occurrence of the homicide, and his conduct on that occasion, we do not regard it as our duty to interfere by a writ of *habeas corpus*, but shall leave it to the grand and petit juries, upon a more complete investigation of all the facts, to determine the guilt of the accused, and the degree of the crime with which he is charged. For these reasons we deny the writ. All concur.

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SHANE V. THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS
RAILROAD COMPANY, *Appellant*.

Surface Water, Rights of Adjoining Proprietors Concerning.

A land owner has no right by erecting an embankment, to stop the natural flow of surface water, or to divert its course so as to throw it upon the land of his neighbor. Overflowed water from a river, in time of flood, is surface water within the meaning of this rule. HOUGH, J., dissenting.

Appeal from Jackson Circuit Court.—HON. S. H. WOODSON,
Judge.

AFFIRMED.

B. F. Stringfellow for appellant.

NAPTON, J.—This action was to recover damages from the defendant for the destruction of five acres of vegetables the plaintiff had in the Missouri River bottom, charged to have been occasioned by the embankment of defendant's road-bed constructed across a slough, without any culvert, by reason of which in the summer of 1873 a rise in the Missouri River and heavy rain-falls in the vicinity were prevented from pursuing their accustomed natural channel to a lake and thence to the river again. By reason of this obstruction, the waters of the overflowed river and the excessive rains were thrown upon the plaintiff's land and destroyed his crops. We insert the testimony and the instructions, from which the points in issue will be more readily ascertained than from the details of the petition.

William Shane, plaintiff, testified as follows: In 1873 I occupied the land described in the petition, which was owned by my wife; had four and one-half acres in cultivation; two acres in corn, one and one-half acres in potatoes, one acre in garden vegetables. All this crop was destroyed on the 7th or 8th day of July by water which had overflowed the banks of the Missouri River. The water in the

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river was very high. It overflowed the bank at a low place and passing in, was stopped by the embankment of defendant's land. It then ran along defendant's road to my wife's land and overflowed it, thus destroying my crops. The low place at which the water was obstructed by the road was about half a mile north of my land. The low place or slough was about one hundred feet wide and five or six feet deep, and ran from the river to a lake about a mile, and from the lake again about a mile the slough passed again into the river. Through this the water from overflows of the river in times of flood had passed before the road was built. I went on the land in the spring of 1871, and have lived there from that time to the present. In July, 1873, the water was from three to three and one-half feet deep on the land, and remained two or three weeks. The crops were all destroyed; the house surrounded by water. I was compelled to remove, and could not safely return for eight or nine weeks. There was no tressel or culvert in defendant's road for passage of water at the low place or from thence to plaintiff's land. The water stood on the land as deep as it did in 1867, though in 1867 the water in river was three feet higher. The road was not built in 1867.

On cross-examination, witness said: In 1867 the water came from the low place or slough spoken of on to my land. In 1873 the water was to within one and one-half or two feet of the top of the road. Have known this land since 1866. The water in floods of the Missouri River has been in the slough as far as the road three or four times in that time; never been out of the slough except in 1867 and 1873. The slough was not wet land, but was generally cultivated, never had water in it except from floods in the Missouri River. The bank of the slough is higher on the north side. Think that from highest part of the bank at distance of 100 feet there is a bank two feet high; this is not a steep bank but a gradual rise. 150 yards from highest the ground is two or three feet higher

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than lowest, and at 400 yards is four feet higher than lowest. This land is surrounded by higher land.

Austin Chouteau, for plaintiff, testified: Lived in 1873 within 150 yards of plaintiff. Knew his crops: two acres corn, one and one-half acres potatoes, one acre vegetables, all destroyed. Have lived there thirteen years. When the water of the river in time of flood got over its bank before the road was built, it passed through a place called a slough to a lake and thence to the river below. It is about one-fourth of a mile from river to railroad, about mile to lake and about two miles to river below. The slough was, in low places, three to four feet deep; in others, two to three feet and from fifty to 100 feet wide. It ran from the river east and was crossed by the embankment of the road running from north to south. There was no culvert in the road where it crossed the slough.

Cross-examined: Since 1863, the river overflowed its banks at the slough five times; has never overflowed the banks of the slough but twice, viz: in 1867 and 1873. In 1867, 1873 and in 1876, these years are the only times the river water has got in the slough as far as the road. In 1876 it did not get to plaintiff's land. It was one and a half or two feet deep in slough in 1876 at road. In thirteen years the water has only interfered with crops in the slough twice. When the road was made, a ditch was made along the road from the slough to Shane's, by taking earth for the embankment. Through this the water passed to Shane's land. The water in 1867 was three feet higher than in 1873. Water of 1867 overflowed Shane. Water of 1873 would not have overflowed Shane but for the rail road embankment.

Wagner, for plaintiff, testified: The slough starts from the river with high banks. Water is prevented from passing through it by the road. A culvert in the road at the slough would have carried the water into the lake and prevented its overflowing plaintiff's land.

Flint, for plaintiff, testified: Have lived within one

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hundred yards of Shane's land since 1865. Know what is spoken of as a slough. It is low ground near the river. It has no distinct banks, As it runs east the banks get higher. At the railroad the north bank is five feet higher than the lowest place. On the south side there is no distinct bank. In some places it seems nearly level; in others about one and a half feet, rising very gradually. It runs east from the river about one mile, and from the lake to the river again below. In 1873 the river overflowed its banks; water came through this low place to the railroad and nearer to plaintiff's land. But for the railroad the flood of 1873 would have passed on east and not have overflowed plaintiff. The water in the river in 1867 was three feet higher than in 1873. The water would have overflowed the banks of the river in 1876 but for an embankment erected by witness and others in 1875 and 1876.

On cross-examination Flint said: Have known the land since 1865. The river overflowed in 1867 and 1873. One other time since 1865, date forgotten, it got out, and part of the distance to the railroad. I yesterday made an examination of the ground with the engineer of defendant. There are several low places, one north of the one spoken of. The slough or lowest ground was in cultivation in 1873 and before that date. The crop in the slough was destroyed in 1873, and would have been in 1875 and 1876 but for embankment. That embankment was of dirt. This bank was highest at the river. The railroad was finished in 1869. There was no water in this low ground then. I think the land in the slough was cleared and inclosed on the east side of the railroad before the road was built. This was lower than on the west side, next the river. It has been in cultivation ever since. The water stayed so long on Shane's land because it had no outlet, his land being lower than adjacent lands.

Lewis, for defendant, testified: I am now employed by defendant as its engineer; have been engaged as a railroad engineer since 1866. A dirt bank is better and safer

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as a bed for a railroad than such a bank with a culvert or other opening, if such an opening can be dispensed with. The low place spoken of by the witnesses does not indicate, except in times of great floods in the Missouri River, any necessity for any culvert or opening in the road-bed for the passage of water. At the time of the construction of the road I was employed as an engineer by defendant, and had occasion to know the character of the low ground spoken of. The road at that place was built in the winter of 1868 and 1869. There was no water in this low place at that time. The place spoken as a slough is not wet land, but is merely low ground, its level varying as other low ground along the Missouri; it has no defined banks. I measured its levels yesterday. The ground is highest at the north side. The highest ground at the bank of the railroad is three feet five inches higher than the ground at a distance of 118 feet. Then going south 150 feet from this lowest point it rises gradually one foot eight and a half inches, thence south 100 feet it falls gradually one foot eleven inches, then south 250 feet it rises gradually one foot eight and a half inches, then 200 feet nearly west, thence 480 feet it continues with scarcely perceptible variations, finally attains a height of one foot two inches higher than last point, thence it falls gradually to plaintiff's land, 740 feet, where it is three feet lower than last point. In the whole distance of about 1,900 or 2,000 feet, the level only varies about three feet.

On cross-examination witness said: An embankment is considered safest without a culvert. One reason is that culverts are liable to wash out when floods come, and drift wood and other *debris* may fill the culvert and injure it or the bank adjoining it. I cannot say whether it would have been more expensive to put a stone culvert into this embankment at the time it was built or to make the bank of dirt, because I do not know the relative cost of stone and earthwork at that time. All railroads have a large number of culverts. Two or three that I have built have

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washed out. I built one on the St. Joseph & Denver road at a place at which water appeared to have flowed, though I could not learn whether any great quantity of water had flowed there. I suppose this drain commenced about two miles from where the culvert was placed. I thought it necessary to put a culvert there. A flood afterward washed it out. So long as a culvert is in good condition the road-bed is as safe as without it.

Thereupon the court, of its own motion, gave the following instructions to the jury:

1. If the jury believe from the evidence that for a number of years prior to the building by defendant of its railroad in Clay county, there existed south of plaintiff's premises a natural drain or slough through which the surplus water of the Missouri River, in high stages, usually and naturally passed without overflowing plaintiff's land, and that in constructing its said railroad defendant made an embankment across said drain so as to obstruct and dam up the surplus water of said river so flowing in said drain, and that by reason of said obstruction the surplus water of said river in the year 1873, during a high stage thereof, was by reason of said embankment obstructed, dammed up and precipitated upon the land of plaintiff, thereby destroying or injuring his crops growing or being thereon, and depriving him of the use of the building on the same, then they must find for the plaintiff and assess his damages at the market value of said crops at the time, on the ground, and the monthly value of the buildings during the time he was necessarily deprived of their use, and the necessary expense of removing from and returning to the same, with six per cent interest per annum from the time of said injury, provided the jury also believe from the evidence that the defendant, by the construction of a culvert or other means of escape for said water, at a reasonable expense and without injury to its said road, could have thereby prevented said injury to plaintiff.

2. Water which escapes from the banks or natural

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channel of a running stream by reason of a flood in the stream occasioned by heavy rains or the melting of snow, is not subject to the law applicable to running streams, but is like surface water, and it may be obstructed or its course changed by the erection of banks necessary for a road-bed, without subjecting the defendant to damages for injury caused by such obstruction.

3. If the jury find that the injury complained of was caused by an embankment erected by defendant, and which was a necessary and proper embankment for the construction of defendant's railroad, they will find for defendant.

To the giving of each of which instructions the defendant objected, and, its objection being overruled, excepted.

The defendant, thereupon, asked the court to give the following instructions :

1. If the jury find from the evidence that the obstruction to the flow of water complained of in the petition was an embankment erected by defendant for its road-bed, and that the same was erected several years before said injury and had been used for such road-bed from its erection to the date of such injury, they will find for defendant.

2. The defendant had the right, in constructing its road, to throw up embankments across low places, and thereby to obstruct the passage of water which in times of floods might overflow the banks of a stream and flow against defendant's road, and is not liable for injury from such obstruction.

3. Defendant was not bound to construct culverts or ways for the passage through its road-bed of water, which, in times of floods, should pass out of or over the banks of some stream adjacent to such road but not obstructed by such road-bed, and is not liable for damages caused by such failure.

4. If the jury find that the injury complained of wa

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caused by an embankment erected by defendant, and which was a proper embankment for the construction of defendant's road, they will find for defendant.

5. Water which escapes from the banks or natural channel of a running stream, by reason of a flood in the stream occasioned by heavy rains or the melting of snow, is not subject to the law applicable to running streams, but is like surface water, and it may be obstructed by the erection of banks necessary for a road-bed, without subjecting the defendant to damages for injury caused by such obstruction.

6. Defendant had the right to construct its road-bed in the usual and proper manner by throwing up and raising the ground for its way-bed and erecting ditches along the side to keep the water off from the track of the road; and if defendant made its road-bed and ditches with reasonable skill, and plaintiff was accidentally injured thereby by the flow of water overflowing the banks of the Missouri in an excessive flood, as charged in the petition, he cannot recover.

All of defendant's instructions, except the 6th, were refused.

The plaintiff had a verdict for \$450, and after a motion for a new trial and in arrest, judgment was entered and an appeal taken to this court. It is hardly necessary to observe to those who are familiar with the decisions in the United States concerning surface water, that an irreconcilable difference of opinion has exhibited itself in regard to the rights and duties of adjoining proprietors of land. This difference may be traced, I imagine, to the great importance attached by the courts on one side to the maxim "*sic utere tuo ut alienum non laedas*," whilst those adopting a contrary view seem disposed to give unlimited effect to the maxim "*cujus est solum, ejus est usque ad coelum*," and therefore leave every proprietor to take care of himself, except where living streams are concerned. The case of *McCormick v. K. C., St. Jo. & C. B. R. R.* 70 Mo. 359,

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essentially depends on the same principles, governing the present case. The facts in that case, it is true, are quite the converse of those now to be considered, but the principle involved is the same. That case was one where the owner of the dominant heritage collected the surface water, percolating through a thousand channels, by an embankment, into a mass, and through a culvert in the embankment, precipitated it thus accumulated upon the servient or lower heritage. This case is where the owner of the servient heritage, by artificial obstacles stops the flow of the surface water and throws it back from its natural channel upon the owner of the higher ground.

The decision referred to adopts the principles decided in Pennsylvania, New Jersey, Ohio, Illinois, Louisiana, North Carolina and Iowa, said to be traced to the civil law, but from whatever source derived, in our judgment, based upon sound reasons of equity and justice, which are summarily stated by Pothier in the following words: "Each of the neighbors may do upon his heritage what seemeth good to him, in such manner, nevertheless, that he doth not injure the neighboring heritage." *Kauffman v. Griesemer*, 26 Pa. St. 411; *Earl v. DeHart*, 12 N. J. Eq. 280; *Butler v. Peck*, 16 Ohio St. 334; 49 Ill. 487; *Minor v. Wright*, 16 Lou. Annl. 151; *Overton v. Sawyer*, 1 Jones Law R. 308; 21 Iowa 164; *Martin v. Jett*, 12 Lou. R. 501. In the case of *Livingston v. McDonald*, 21 Iowa 164, the supreme court of that State, through that eminent jurist, Judge Dillon, carried the doctrine declared by this court in *McCormick v. K. C., St. Jo. & C. B. R. R.*, to the extent of determining that a subterraneous ditch which increased the quantity of water upon the lower heritage, or, without increasing the quantity, threw it upon the lower field in a different manner from what it would have flowed naturally, made the proprietor of the upper heritage responsible for the damage, and Judge Dillon remarks in conclusion: "We recognize the fact (to use Lord Tenterden's expression) that surface water or slough water is a common enemy which each

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land owner may reasonably get rid of in the best manner possible; but in relieving himself he must respect the rights of his neighbor, and cannot be justified by an act having the direct tendency and effect to make that enemy less dangerous to himself and more dangerous to his neighbor. He cannot make his estate more valuable by an act which unnecessarily renders his neighbor's less valuable."

By the same reasoning, as was observed by the supreme court of Illinois in *Gillham v. Madison Co. R. R. Co.*, 49 Ill. 487, the reverse of the proposition must be true, that the owner of the lower heritage cannot, by an embankment or other artificial means, obstruct the natural channel through which the surface water is accustomed to flow, and throw it back upon the upper proprietor. In a later case in Illinois, (*Gormley v. Sanford*, 52 Ill. 160,) the decision in *Gillham v. Madison Co. R. R.* was reiterated, and it was again held that the owner of the servient heritage has no right, by embankment or other artificial means, to stop the natural flow of the surface water from the dominant heritage, and thus throw it back upon the latter. The remarks of Mr. Justice Lawrence in this case are worthy of observation and apply *a fortiori* to the present case, and we, therefore, copy them: "This question has already been decided by this court in *Gillham v. Madison Co. R. R. Co.* *"

* In the opinion filed in that case we said, although there was a conflict of authorities among the courts of this country, yet the rule forbidding the owner of the servient heritage to obstruct the natural flow of surface water, was not only the clear and well settled rule of the civil law, but had been generally adopted in the common law courts both of this country and in England. Various cases bearing on each side of the question are cited in that opinion, and it is not necessary to cite them again. This rule was thought by this court, in that case, to rest upon a sound basis of reason and authority, and was adopted. We find nothing in the argument or authorities presented in the present case, to shake our confidence in the conclusion at which

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we then arrived. In our judgment, the reasoning which leads to the rule forbidding the owner of a field to overflow an adjoining field by obstructing a natural water course fed by remote springs, applies with equal force to the obstruction of a natural channel through which the surface waters, derived from the rain or snow falling on such field are wont to flow. What difference does it make in principle, whether the water comes directly upon the field from the clouds above, or has fallen upon remote hills and comes thence in a running stream upon the surface, or rises in a spring upon the upper field and flows upon the lower? The cases asserting a different rule for surface waters and running streams furnish no satisfactory reason for the distinction. It is suggested in the argument, if the owner of the superior heritage has a right to have his surface waters drain upon the inferior, it would follow that he must allow them so to drain, and would have no right to use and exhaust them for his own benefit or to drain them in a different direction. We do not see why this result should follow. The right of the owner of the superior heritage to drainage is based simply on the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature. As water must flow, and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule, at once so equitable and so easy of application, as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land."

I confess, for myself, that, like Mr. Justice Lawrence, I am unable to perceive the distinction between surface water coming, as he says, from the clouds, and that which rises in a spring, especially in this case, where the surface water comes from the Rocky Mountains, a thousand miles

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from where the overflow of the Missouri River occurs, occasioned as it is, not by rains or snows in its vicinity, but by the melting of snows upon the mountains and by the accession of a thousand tributary streams. But it must be considered as well settled that this overflow of the Missouri is what is in law termed surface water.

In *Kauffman v. Griesemer*, 26 Pa. St. R. 408, the instructions of the judge who tried the case were, that the water which the defendant obstructed was not a living stream, but came from rains and snows, but that the accustomed, though not continuous, flowage of such water was in the eye of the law a stream and no more to be obstructed than if it was a channel of a continuous stream that never failed. These instructions were approved by the supreme court, and that court observes that: "The plaintiffs had no right to insist upon his receiving waters which nature never intended to flow there, and against any contrivance to reverse the order of nature he might peaceably take measures of protection." In *Martin v. Riddle*, 26 Pa. St. 415, Judge Lowrie says: "Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position. * * Hence, the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped, nor has the owner of the upper ground a right to make any excavations or drains by which the flow of water is diverted from its natural channel and a new channel made on the lower ground, nor can he collect into one channel waters usually flowing off into his neighbor's field by several channels, and thus increase the wash upon the lower fields."

The supreme court of Ohio, in *Butler v. Peck*, 16 Ohio St. 343, unhesitatingly adopted the principle thus decided in Pennsylvania. The question in that case was "whether an owner of land having upon it a marshy sink or basin of water, which basin, as to a considerable portion of the

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water collected on it, has no outlet, may lawfully throw such water by artificial drains upon the land of an adjacent proprietor." The court say, "We are clear that no such right exists. It would sanction the creation, by artificial means, of a servitude which nature has denied. The natural easement arises out of the relative altitudes of adjacent surfaces as nature made them, and those altitudes may not be artificially changed to the damage of an adjacent proprietor."

In North Carolina, the supreme court, in *Overton v. Sawyer*, 1 Jones L. R. 308, observed: "The defendant had a right to have the water allowed to pass off his land through the natural drain; and when the plaintiff, by means of the embankment across this natural drain, obstructed the water and interfered with this right, the latter (the defendant) had a cause of action against the former, for causing the obstruction."

What is said by the court of errors in New Jersey, in the case of *Earl v. DeHart*, 1 Beas. R. 280, seems to conform to Mr. Justice Lawrence's views in the Illinois case we have cited, and to apply to the slough, or swale, or hollow through which the waters of the river passed when they overflowed its banks, and across which the defendant's road was built. The chancellor says: "The facts admitted in the answer show that this is an ancient stream or water course, and that it is a natural water course, in the etymological use of the term. A water course is defined to be a channel or canal for the conveyance of water, particularly in draining lands. It may be natural, as when it is made by the natural flow of the water, caused by the general superficies of the surrounding land from which the water is collected into one channel, or it may be artificial, as in case of a ditch or other artificial means used to divert the water from its natural channel, or to carry it from low lands, from which it will not flow in consequence of the natural formation of the surface of the surrounding land. It is an ancient water-course, if the channel through which it naturally runs has

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existed from time immemorial. Whether it is entitled to be called an ancient water-course, and as such legal right can be acquired and lost in it, does not depend upon the quantity of water it discharges. Many ancient streams of water, which, if dammed off, would inundate a large region of country, are dry for a great portion of the year. If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows and has flowed from time immemorial, such channel is an ancient natural water-course."

The court, therefore, held, that where the surface of the ground is such as to collect water at different seasons of the year to an extent which requires an outlet, and if such is always the case in times of heavy rains and melting snow, and if that flow of water produced a natural channel through the lands of different persons where such accumulated surplus water has always been accustomed to run, a court of equity would protect such channel from obstruction to the injury of any one through whose land it runs. This corresponds with the view of the judge in *Kauffman v. Griesemer*. The judge who tried this case observes: "The declaration speaks of a stream of water being used to flow. There is no stream in the usually received sense of that word, as being a continuous flowage of water. The water that flowed down was such as came from springs which do not seem ever to have had a continuous flow that reached defendant's land, and such as came from rains and snows. But the accustomed, though not continuous flowage of water, is a stream in the eye of the law, and its channel is no more to be obstructed than if it was the channel of a stream that never failed. *

* Whatever is the natural direction of the excess

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of waters in floods and freshets, as in seasons of ordinary water, must be left as nature has made it; no one has a right to divert it from himself and cast it upon his neighbor to save himself at the expense of another."

Of course the immemorial usage spoken of in the New Jersey case can hardly be claimed here, since there was no witness in the case who spoke of having any knowledge of the river floods beyond thirteen years before the trial, but the question as to this slough being the natural channel through which the waters of the Missouri River passed in times of floods, was put to the jury in an instruction given by the court, and was found by the jury, and upon the evidence submitted, they could not have found otherwise than they did, for upon this point all the witnesses were agreed, though they could not speak of time immemorial, beyond which the memory of man did not reach.

The principles which are at the bottom of this case, if taken from the civil law, a system which, as Judge Dillon remarks in *Livingston v. McDonald*, "embodies the accumulated wisdom and experience of the refined and cultivated Roman people for a thousand years, and though not binding as authority, is of great service to the inquirer after the principles of natural justice and right," and from which many of the usages of the common law and equity courts both in England and this country are derived, were recognized by this court as early as the case of *Laumier v. Francis*, 23 Mo. 181, in which the opinion of this court was delivered by Judge Leonard, when associated with Judges Scott and Ryland, all three of whom are well known in this State, and have been in the front rank of our most eminent jurists.

We deem it unnecessary to refer particularly to the decisions in Louisiana, as they are uniformly in conformity with the principles of the cases already cited from Pennsylvania and other States. On the other hand, the cases in Massachusetts and several other of the New England States, following the case of *Gannon v. Hargadon*, 10 Allen 106,

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adopt the rule of allowing every proprietor to control surface water as he pleases, without regard to contiguous proprietors. Still, as even in these States this right is carefully distinguished from similar rights where a water course exists by grant or prescription, it is not entirely certain how the courts would apply these doctrines to a case like the present. So in New York the general principle asserted in *Gannon v. Hargadon* seems to be maintained in *Goodale v. Tuttle*, 29 N. Y. 459, where Judge Denio says: "In respect to the running off of surface water, *

* I know of no principle which will prevent the owner of land from filling up the wet and marshy places in his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it." This is a mere reiteration of the doctrine of "*saure qui peut*," or as propularly translated into our vernacular "the devil take the hindmost." We prefer that asserted by this court in *Laumier v. Francis*, and repeated in *McCormick v. K. C., St. Jo. & C. B. R. R.*

Nor do we think that equitable and just principles, as we understand it, will materially retard agricultural operations or improvements. The facts in the present case show that the defendant could have built a rock culvert at the crossing of this hollow, at about the same cost with the dirt embankment. The engineer seems to have been misled by the dry and rich soil which extended to the very bottom or lowest part of the swale, portions of which were in cultivation, and although the road was equally strong and safe with a rock culvert or a dirt embankment, the engineer preferred the latter, as "not so liable to wash out when floods come; and drift wood and other *debris* fill the culvert and injure it or the bank adjoining it." The first instruction given for the plaintiff contained all the law necessary to enable the jury to pass upon the facts submitted, and the second and third, and the sixth given for defendant certainly cannot be complained of by defendant. The

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judgment of the circuit court is affirmed. SHERWOOD, C. J., and HENRY and NORTON, JJ., concur.

HOUGH, J., DISSENTING.—I adhere to the opinion of this court in *McCormick v. K. C., St. Jo. & C. B. R. R.*; 57 Mo. 433, the doctrine of which I conceive to be at variance with the rule adopted by my associates for this case. In the case cited, the right of the proprietor of the soil to change the flow, or obstruct the natural course of surface water, is clearly and distinctly announced in the following language: "The general rule, however, is that either municipal corporations or private persons may so occupy and improve their land, and use it for such purposes as they may see fit, either by grading or filling up low places, or by erecting buildings thereon, or by making any other improvement thereon, to make it fit for cultivation or other profitable or desirable enjoyment; and it makes no difference that the effect of such improvement is to change the flow of the surface water accumulating or falling on the surrounding country so as either to increase or diminish the quantity of such water, which had previously flowed upon the land of the adjoining proprietors to their inconvenience or injury. Ang. Wat. Cour., p. 122, § 108, and following, and cases there cited; *Goodale v. Tuttle*, 29 N. Y. 459; *Waffle v. N. Y. Cen. Ry. Co.*, 58 Barb. 413; *Turner v. Inhabitants*, 13 Allen 291; *Imler v. City of Springfield*, 55 Mo. 119, and cases there cited. The same rule would apply to water flowing over the country, which had escaped from the banks or natural channel of a running stream of water, by reason of a flood in the stream occasioned by heavy rains or the melting of snow upon the surrounding country."

In *Goodale v. Tuttle*, 29 N. Y. 459, cited by Judge Vories in support of his opinion in the case just quoted from, Denio, C. J. said: "And in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling

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up the wet and marshy places on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface." In *Gannon v. Hargadon*, 10 Allen 106, Bigelow, C. J., said: "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow."

In *Hoyt et al. v. The City of Hudson*, 27 Wis. 656, Dixon, C. J., after stating the rule of the civil law of dominant and servient heritage, which he rejects, proceeds as follows: "The doctrine of the common law is, that there exists no such natural easement or servitude in favor of the owner of the superior or higher ground or fields as to mere surface water, or such as falls or accumulates by rain or the melting of snow, and that the proprietor of the inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon or off on to or over the lands of other proprietors without liability for injuries ensuing from such obstruction or diversion. This is the rule in England, and in Massachusetts, New York, Connecticut, Vermont, New Jersey and New Hampshire, as will be seen by the authorities cited in *Pettigrew v. Evansville*, 25 Wis. 223, and also the following: *Bowlsby v. Speer*, 31 N. J. Law Rep. (2 Vroom) 351; *Dick-*

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inson v. Worcester, 7 Allen 19; *Chatfield v. Wilson*, 28 Vt. 49; *Swett v. Cutts*, 50 N. H. 439; *Trustees v. Youmans*, 50 Barb. 316; *Waffle v. N. Y. Central Ry. Co.*, 58 Barb. 413. Excluding from its operation surface water falling or accumulating on his own land, which, as decided in *Pettigrew v. The Village of Evansville*, the proprietor may not divert or cause to flow upon the land of another to his injury, the rule of the common law is correctly stated in *Bowlsby v. Speer*, that no legal right of any kind can be claimed, *jure naturae*, in the flow of surface water, so that neither its retention, diversion or repulsion is an actionable injury, even though damage ensue. An examination of the last named case will also show that the case of *Earl v. DeHart*, 1 Beas. 280, cited and relied upon in argument here, has been virtually overruled."

In *Bowlsby v. Speer*, *supra*, Beasely, C. J. said: "The owner of land may, at his pleasure, withhold the water falling on his property from passing in its natural course on to that of his neighbor, and in the same manner may prevent the water falling on the land of the latter from coming on to his own. * * Nor does it seem to me that there is any significance in the fact that there was an appreciable channel for this surface water over the land of the defendant and into which it naturally ran. On every hill-side numbers of such small conduits can be found, but it would be highly unreasonable to attach to them all the legal qualities of water courses. I am not willing to adopt a doctrine which would be accompanied with so much mischief." It appears from the statement of facts in that case, that the defendant built a stable over a hollow on his own land, through which the surface water was accustomed to pass, and this obstacle turned the course of the water, so that it ran on to the lot and into the cellar of the dwelling house of the plaintiff. It was held that the plaintiff had no right of action.

In the case of *Livingston v. McDonald*, 21 Iowa 160, in which a very able and most interesting opinion was deliv-

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ered by Judge Dillon, it appeared that the water naturally flowed from the defendant's low or slough land into and upon like land of the plaintiff. The defendant constructed a mole or underground ditch about two hundred yards in length a short distance below the surface, in his slough land, which terminated in an open end or mouth near the land of plaintiff, and thus concentrated the water laterally received by it throughout its whole length and emptied it in a body upon the land of the plaintiff. This Judge Dillon decided the defendant had no right to do. Nor under the common law rule, as laid down in *McCormick v. R. R.*, *supra*, could this have been done. But Judge Dillon by way of caution perhaps, wisely observes in the same case that, "It may be doubted whether the common law courts in this country would adopt what seems to be the rule of the civil law, so far as to preclude the lower owner from making, in good faith, improvements, which would have the effect to prevent the water of the upper estate from flowing or passing away." On a question like that now before us, the decisions in Louisiana cannot be received as authority in this State, since, as is well known, they are based upon positive provisions of the civil code regulating the subject, in force in that State. La. Code, Art. 656. In the case from that State cited in the opinion of the majority, Duffel, J., observes: "This court has, on more than one occasion, expressly declared that a strict and rigid application of the articles of the code on the title of predial servitudes would be destructive to agricultural industry. *Martin v. Jett*, 12 La. 503; *Sowers v. Shift*, 15 La. Ann. 300." And in the case last cited the same learned judge further said that a strict application of the articles of the code "would condemn to perpetual sterility all the rich lands in lower Louisiana bordering on the Mississippi River."

Judge Redfield in commenting upon the case of *Sweet v. Cutts*, 50 N. H. 439, makes the following pointed and emphatic declarations on this subject: "It must be conceded, we think, that the right of land owners to deal

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with surface water and all water mixed with the soil, or coming from underground springs, in any manner they may deem necessary for the improvement or better enjoyment of their own land, is most unquestionable, and if by so doing, in good faith and with no purpose of abridging or interfering with any of their neighbors' rights, they necessarily do damage to their neighbors' lands, it must be regarded as no infringement of the maxim, *sic utere tuo ut alienum non laedas*, but must be held *damnum absque injuria*."

But there is a more potent reason for upholding in this State the common law rule on this subject than is to be found in all the learned judgments of the distinguished jurists whose opinions have been cited. Section 3117 of the Revised Statutes, which has been in force in this State since the year 1816, declares that the common law of England, when not repugnant to the constitution of the United States or the constitution and laws of this State, "shall be the rule of action and decision in this State, any law, custom or usage to the contrary notwithstanding." While common law judgments are frequently illustrated by reference to the civil law, and while this court is at liberty to resort to any system of jurisprudence for a rule of action when the common law and our statutes fail to furnish one, yet when the common law does furnish a rule, under the statutes cited, I do not conceive that this court is at liberty to disregard it.

Laumier v. Francis, 23 Mo. 181, referred to in the opinion of the court, was an action against the defendant for levying a nuisance by accumulating a body of water on a lot in his possession adjoining a building in the possession of the plaintiff. Judge Leonard, after defining a servitude under the civil law, proceeds as follows: "We, of course, know nothing about the facts of the present case; but if such was the natural situation of these lots, and the plaintiff dammed up the water on the defendant's lot, by erecting a house upon his own, it is very obvious that he

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cannot recover any damage occasioned thereby to his own property. * * In the case supposed, the plaintiff himself would be the author of the nuisance, and of course could not hold another responsible for the damages that resulted to him from his own act." The judgment of the circuit court, however, was expressly reversed upon another ground, and no decision was, or could have been made upon facts which were not before the court. On the facts supposed, no recovery could have been had under the common law. For example, the defendant in this case could not have recovered damages from any one for injury done to its embankment by the surface water which it had dammed up. Besides, as Judge Leonard cited the case of *Cooper v. Barber*, 3 Taunton 99, in support of his views, there is as much ground for saying that he adopted the common law rule, as there is for saying that he adopted that of the civil law. Neither rule was maintained as against the other in that case.

If the defendant in this case had constructed a culvert or other opening in its embankment for the passage of the flood through it upon the adjoining fields in the swale on the other side of its road, as is suggested in the opinion of the court, I do not see why the defendant would not have been liable for the injury thereby inflicted upon the owners of such fields, under the decision made at the present term in *McCormick v. The K. C., St. Jo. & C. B. R. R.*, (the present defendant) 70 Mo. 359. So that if the company builds an embankment without any opening, it will be liable for the damages arising from the obstructed surface water on one side, and if it constructs an embankment with an opening, it will be liable for the damage done by the surface water passing through it on the other side.

The first and second instructions given for the plaintiff are conflicting. I am of opinion that the second and third instructions asked by the defendant should have been given, and the first given for the plaintiff should have been

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refused, and that the judgment of the circuit court should, therefore, be reversed and the cause remanded.

McGONIGLE V. DAUGHERTY, *Appellant*.

1. **Instructions.** The appellant cannot complain of error in instructions given at the instance of the respondent if those given at his instance contain the same error.
2. ———. Instructions are properly refused when the principles declared in them have already been enunciated in others.

Appeal from Adair Circuit Court.—HON. JOHN W. HENRY,
Judge.

AFFIRMED.

This was an action of replevin. It was conceded by defendant that the property in controversy had at one time belonged to plaintiff, but he alleged that plaintiff, who was an aged man, had proposed to him that if he would leave his home in Ireland and come with his family to Knox county, Missouri, and there live with plaintiff, upon his farm, and take care of and support him, plaintiff, as long as he lived, he, plaintiff, would give him all his property; that he had accepted the proposition and carried it out on his part, and that plaintiff, on his part, had executed an instrument in writing conveying the property to him, and had also delivered the possession to him. Under the instructions of the court the jury negatived defendant's claim, and there was judgment for plaintiff from which defendant appealed.

W. C. Hollister, G. F. Ballingal and Harrington & Cover
for appellant.

E. V. Wilson, W. R. McQuoid, E. G. Pratt and Ellison
& Ellison for respondent.

NORTON, J.—Defendant seeks a reversal of the judgment in this case because of alleged error committed by the court in giving improper instructions on the part of plaintiff, and refusing proper instructions asked by defendant. The following are the instructions given by the court on the part of plaintiff:

1. The court instructs the jury that before they can find for defendant, Daugherty, they must first believe from the evidence that plaintiff, McGonigle, did sell and deliver, or give and deliver, to defendant the property in question.

2. That although they may believe from the evidence plaintiff may have made a will giving defendant the most of his property, still the will, by its own terms, did not take effect till after death of plaintiff, and, apart from other facts and circumstances, conferred no title to defendant, nor any right to the possession of the property.

3. That a will bequeathing property to a party is an instrument which is not to take effect till after the death of the party making it. If, therefore, the jury believe from all the evidence that plaintiff has never yet given said property to defendant and turned over the possession to him, then they will find for plaintiff.

4. Although the jury may believe from the evidence that plaintiff wrote to defendant in 1866 to come to the United States, and that he had 311 acres of land, cattle, hogs, sheep and other stock, and if defendant would come to this country, he would give him, the defendant, all of his property, that all he wanted was a living, and if they should further believe from the evidence that defendant did come from Ireland to the premises of plaintiff for the purpose of accepting of the offer of plaintiff, yet they cannot find a verdict for the defendant in this cause, unless they should also believe from the evidence that the property in question was delivered by the plaintiff into the possession of the defendant in pursuance of the contract

and agreement made by the parties, and was actually given to him.

5. The court instructs the jury that the term preponderance of testimony or proof, does not mean where two witnesses or more swear to a fact, and one or a less number swear to the contrary, that the jury must find the facts sworn to by the two or greater number to be true, but that they may take into consideration all the circumstances of the case, the opportunities, manner and interests of the witnesses, and are at liberty, if they choose, to accept the evidence of the less number of witnesses against that of the greater number.

6. That before they can find a sale from plaintiff to defendant, they must believe from the evidence, plaintiff as well as defendant understood that which had transpired between them to be a sale and transfer of the property at the time, and that an actual transfer and delivery of the possession of the property was made by plaintiff to defendant, and that it was so understood by both parties.

7. The jury are the exclusive judges of the credibility of the witnesses and the weight to be given to their evidence, and in determining these facts the jury may take into consideration the interest the witnesses have in the result of the suit; their relationship to the parties to the suit; their manner of testifying, and their conduct while delivering their evidence, and if they believe that any witness willfully swore falsely to any material fact in issue in the cause, then they may reject and disregard the whole of said witness' testimony.

8. The court instructs the jury that the instrument of writing read in evidence, called the will of James McGonigle, by the terms and possession of said will alone, does not convey to the defendant, Owen Daugherty, any title to the property in controversy nor authorize Daugherty to take possession thereof.

The following are the instructions given by the court on the part of defendant:

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1. The court instructs the jury on the part of defendant that the burden of proof is on the plaintiff to show by a preponderance of evidence that plaintiff was the owner of the property in question at the time of instituting this suit and was entitled to the immediate possession thereof, and if the jury believe that on or about the 1st day of May, 1866, the plaintiff wrote a letter or caused one to be written to Dennis Daugherty, his brother-in-law, in Ireland, telling him that he had 311 acres of land, plenty of horses, cows and all other kinds of stock, and requesting him to send defendant, Owen, to him, and if he came all his property would be his, and that said Dennis communicated the contents of said letter to defendant, and that defendant accepted said offer, and that said defendant and his family did accordingly come to this country in pursuance of said request of plaintiff, and that said plaintiff did give all of his property to defendant and put him in possession thereof, and that said property, with the increase thereof, is the same property now in question, then they will find for the defendant.

2. If the jury believe from the evidence that after the defendant came to this country and whilst defendant's family was in Ireland, the plaintiff, about January, 1867, promised and agreed that if defendant would send for his family and bring them to this country, and live with him, all of his property should be his, and that, if in pursuance of said promise defendant sent for his family and brought them to this country, and lived with plaintiff, and in good faith accepted said promise, and that plaintiff did give defendant all of his property, a part of which is now in question, and that the plaintiff put the defendant in possession of said property, and at the same time requested the defendant not to exercise open and notorious acts of ownership over said property, but to keep said gift and ownership of the same secret from all persons but the defendant's family, then the jury will find for the defendant.

3. If the jury believe from the evidence that after he

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came to this country, and whilst his family were in Ireland, plaintiff promised defendant that if he would send for his family and live with him, plaintiff would give him all his property, that all should be defendant's, and that the property in question with the increase thereof is a part of the property then owned by plaintiff, and that in pursuance of said promise defendant in good faith sent for his family and brought them to this country, and that then and thereupon plaintiff gave his said property to defendant, and put him into possession thereof, and if they further believe from the evidence that then and thereupon, on or about May 4th, 1868, the plaintiff, more effectually to evidence his intentions in the gift of said property and their possession thereof, made, executed and delivered the written instrument read in evidence, and if they find that at the time of the said delivery or previous thereto, plaintiff had put defendant in possession thereof by virtue of said gift, and that plaintiff believed and intended to do an irrevocable act at the time, by the execution and delivery of said instrument, and believed and understood the same to pass the title to said property, and at the same time informed defendant that such was its character, and that defendant relying upon and believing said statement to be true, accepted the instrument of writing with such understanding of its character so represented, then the jury should find for the defendant, and in arriving at these facts they may take into consideration all the facts and circumstances and acts of the parties relating to the property in question, the objects the parties had in view, their inclinations, the situations and circumstances surrounding them.

4. Although the jury may find from the evidence that the property in question was assessed in the name of the plaintiff, and that the plaintiff paid the taxes thereon, and that plaintiff in part managed and controlled said property, yet if they further find that plaintiff had given said property to defendant, and that defendant was the rightful owner thereof, and that there was a secret agree-

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ment and understanding between the plaintiff and defendant that defendant was to keep the gift and ownership of said property secret, and not to exercise open and notorious acts of ownership over the same, then they will find for the defendant.

5. The jury are instructed that in determining the issues between the plaintiff and defendant, any evidence they may find showing or tending to show acts of hostility, abusive language, or unkind feelings, or bad treatment used toward or entertained against the plaintiff, is excluded from their consideration, and that such evidence was admitted solely for the purpose of affecting the credibility of such witness or witnesses, and for no other purpose.

6. If the jury believe from the evidence that defendant has had exclusive and adverse possession of the property in question for and during a period of five years next preceding the bringing of this action, then they will find for the defendant.

7. If the jury believe from the evidence that the plaintiff, in consideration of the defendant's keeping him during his natural life, agreed with the defendant that he would secure his property to the defendant so that his other relatives could not take the same from him, and, intending to carry out said agreement, made, executed and delivered the instrument of writing read in evidence, purporting to be a will, and at the same time delivered the possession of said property to the defendant, then said instrument transferred and conveyed to the defendant all of said property, and the jury will find for the defendant.

8. If the jury believe from the evidence that the property in question was, at the time McGonigle first advertised the same for sale, the property of the defendant, then he had the right to refuse to allow it to be sold, and was justified in urging all lawful means to prevent it, and driving the hogs off to the brush was not unlawful.

9. If the jury find for the defendant, they will assess his damage at the reasonable value of said property, at the

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time it was taken from defendant, with six per cent interest thereon, from the time of taking the same until the present time, together with reasonable damages for the taking and detention of the same.

The following are the instructions asked by the defendant and refused by the court :

11. If the jury believe from the evidence that on or about the 4th day of May, 1868, the plaintiff delivered the property to the defendant as his own, and made, executed and delivered to the defendant the instrument of writing read in evidence purporting to be a will, intending thereby to give the property to the defendant for taking care of him, then said instrument transferred and passed to the defendant a present title to said property, and is a contract, and the jury will find for the defendant.

12. The court instructs the jury, on the part of the defendant, that the plaintiff admits in his evidence that he made and delivered the instrument of writing read in evidence, called a will, to the defendant, and if they further believe from the evidence that said instrument was made and delivered in bad faith, and with the intent to deceive the defendant, and if they further believe from the evidence that the defendant received said instrument in good faith, believing at the same time that it was a conveyance of the property in question to him, and that accordingly he took possession of the same, then, in that case, plaintiff is bound by the terms of such instrument and cannot take advantage of the same, and the jury will find for the defendant.

It is insisted that instructions numbered one, three, four and six, given for plaintiff, are erroneous, because the jury are in effect told by them that although they might believe the property in dispute was sold by plaintiff to defendant, yet unless they further believed that possession thereof was delivered defendant, they could not find for him. In so far as the said instructions enunciated that principle they are clearly erroneous. In case of a sale of

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personal property, as between vendor and vendee, delivery of possession of the property sold is not necessary to pass the title to the vendee. When the sale is complete, the vendee is entitled to the possession, and may recover it by suit. But notwithstanding this error we hold that defendant cannot set it up for the reason that he asked and the court gave instructions numbered one, two, three, six and seven, based on the same theory of the case as set forth in the instructions complained of, that were given for plaintiff, and in accordance with the theory of defendant as made in his answer. This point has been expressly decided in the cases of *Crutchfield v. St. Louis, K. C. & N. Ry. Co.*, 64 Mo. 255, 257; *Capital Bank v. Armstrong*, 62 Mo. 59; *Davis v. Brown*, 67 Mo. 313. Instructions numbered eleven and twelve were properly refused, inasmuch as the same principle declared in them had been given in instructions two, three, four and seven. Judgment affirmed, in which all concur.

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1. **Constitutional Law** : SUBJECT AND TITLE OF ACT : ELECTION LAW. If all the parts of an act are germane to the subject indicated by the title, the act does not violate section 28, article 4 of the constitution, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title." A provision in an act "concerning popular elections," authorizing the governor to fill vacancies in elective offices is germane to the general subject and is valid. R. S. 1879, § 5527.
2. **Constitutional Provisions, Mandatory, Directory** : LEGISLATIVE PROCEEDINGS : JOURNALS OF THE LEGISLATURE. The first clause of section 37, article 4 of the constitution : "No bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session," is mandatory ; the remaining clauses of the section are directory.

An act is not to be held void because the journals of the Legislature fail to show a strict observance of the formalities prescribed by these clauses, as, for instance, that the presiding officer suspended all other

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business and declared that such bill would then be read, and that, if no objections were made, he would sign the same, to the end that it might become a law, nor that the bill was immediately sent to the other house.

3. **Legislative Proceedings and Journals:** BILLS TO BE SIGNED IN OPEN SESSION. It is not essential to the validity of an act that the journals of the Legislature should expressly state that the signing by the presiding officers of the two houses was done in "open session."
4. : ———: PRESENTING BILLS TO THE GOVERNOR. It is not essential to the validity of an act that the journals of the Legislature should show that the requirements of section 38, article 4 of the constitution, have been complied with by the secretary of the senate or the clerk of the house of representatives, one or the other of whom (according as the bill originated in the senate or house) is required by that section to present every bill as soon as it has been signed by the presiding officers of both houses, and on the same day, in person, to the governor. The requirements of that section are directory only.
5. **Section 5527** of the Revised Statutes is not subject to any constitutional objection.

Original Quo Warranto.

JUDGMENT OF OUSTER AWARDED.

The respondent, Mead, having been appointed by the county court of Livingston county to fill a vacancy in the office of recorder of deeds of that county, the attorney general instituted this proceeding to vacate the appointment.

J. L. Smith, Attorney-General, for the State.

Henry Flanagan for respondent.

SHERWOOD, C. J.—The question for determination in this case is whether the law under which the respondent claims his appointment was repealed, the former law (G. S., p. 162, § 28) providing that the county court should temporarily fill a vacancy in the office of recorder of deeds, while the law relied on by relator, and which is alleged to

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have gone into effect on the 1st day of November, 1879, provides that such and similar vacancies "shall be filled by appointment by the governor." (Rev. Stat. 1879, § 5527, p. 1085.) This law undoubtedly accomplished the repeal of the former one, if possessed of constitutional validity. Three objections are, however, taken on the score of lack of conformity to constitutional requirements. *First.* That the recent statute, the title of which is, "An act to amend and revise chapter 2, title 2, of the General Statutes of Missouri concerning popular elections," violates section 28 of article 4 of the present constitution, which requires that "No bill shall contain more than one subject, which shall be clearly expressed in its title." *Second.* That in the passage of the act in question, section 37 of article 4 of the constitution was violated. *Third.* That section 38 of the same article was also violated. We will consider in the order mentioned the objections urged.

1. The first would seem to require but little discussion, since similar objections have heretofore received discussion by us. *State ex rel. v. Lafayette Co.*, 41 Mo. 39; *City of St. Louis v. Tiefel*, 42 Mo. 578; *City of Hannibal v. The County of Marion*, 69 Mo. 571. The principle to be readily deduced from these cases and the authorities cited, is, that if any matter contained in a statute be objected to, as not referred to in the title, or that the bill contains more than one subject, the objection urged will not be held well taken, if the clause or section to which objection is raised be germane to the subject treated of in the title. Applying this recognized principle in the present instance, section 5527, *supra*, will be found in entire harmony with it, for there is an obvious connection and congruity between the idea expressed in the title, "Concerning popular elections," and that of providing for filling, by gubernatorial appointment, vacancies temporarily occurring in offices filled, in the first instance, by the ordinary machinery of an election, and to be so filled again when the temporary exigency which occasions

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LAW: subject and
title of act: elec-
tion law.

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the temporary appointment has, with the cause in which it had its origin, ceased to exist. This point must, therefore, be ruled against respondent.

II. Next for consideration is whether the statute now being discussed met, in its passage, with such conformity to the provisions of section 37 of article 4 of the constitution, as enables us to say, that section has not been infringed in the passage of that statute.

2. CONSTITUTIONAL PROVISIONS, MANDATORY, DIRECTORY: legislative proceedings: Journal of legislature.

Section 37 is as follows: "No bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session; and before such officer shall affix his signature to any bill, he shall suspend all other business, declare that such bill will now be read, and that, if no objections be made, he will sign the same, to the end that it may become a law. The bill shall then be read at length, and if no objections be made, he shall, in presence of the house in open session, and before any other business is entertained, affix his signature, which fact shall be noted on the journal, and the bill immediately sent to the other house. When it reaches the other house, the presiding officer thereof shall immediately suspend all other business, announce the reception of the bill, and the same proceedings shall thereupon be observed in every respect as in the house in which it was first signed. If in either house any member shall object that any substitution, omission or insertion has occurred, so that the bill proposed to be signed is not the same in substance and form as when considered and passed by the house, or that any particular clause of this article of the constitution has been violated in its passage, such objection shall be passed upon by the house, and if sustained, the presiding officer shall withhold his signature, but if such objection shall not be sustained, then any five members may embody the same, over their signatures, in a written protest, under oath, against the signing of the bill. Said protest, when offered in the house, shall be noted upon the journal, and

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the original shall be annexed to the bill to be considered by the governor in connection therewith."

At the time of the delivery of the opinion in the case of the *Pacific Railroad v. The Governor*, 23 Mo. 353, which held that the validity of an enrolled statute, authenticated in conformity with law, could not be impeached by the journals showing non-compliance with constitutional forms in the reconsideration of a bill, the only provision in the constitution in reference to the authentication of a bill passed by both houses then was that it should "be signed by the speaker of the house of representatives and by the president of the senate." Art. 3, § 21, Const. 1820. But upon the adoption of the constitution of 1865, a prohibitory section similar to section 31, *infra*, was added to section 21 just mentioned, in these words: "No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the general assembly; and the question upon the final passage shall be taken immediately upon the last reading, and the yeas and nays shall be taken thereon and entered upon the journal." (Const. 1865, Art. 4, § 24). As if with the advance toward a "higher civilization" greater precautions were requisite in legislative matters than in the early days of our State's history.

Respondent relies upon the journals to make out his case. The intimation is given in *Bradley v. West*, 60 Mo. 33, that the legislative journals might, in proper circumstances, be received in evidence to show that a law had not been passed in accordance with the constitutional requirements. The great current of authority is certainly in favor of such evidence for such a purpose, and that the journals may disclose such a state of facts as will warrant the courts in holding a statute void. Cooley Const. Lim., 135, 136, and cases cited. We have no question but that this view is the correct one. Taking this, then, as the starting point, let us see if, upon examination, the journals will support or overthrow the statute. In order satisfactorily to determine

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this, it first becomes necessary to inquire whether section 37 is mandatory or directory, for if the latter, the omission of the journals in certain particulars would not be a fatal one.

We are convinced that the initial clause of the section that "no bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session," is mandatory, though it is quite evident that the mandate of the constitution would be obeyed, so far as concerns proper authentication of the bill, when it receives the signature of the respective presiding officers in open session. But we do not regard the other clauses of the section under review as mandatory; for it is to be observed that those clauses do not declare that "no bill shall become a law," if the presiding officers or the members fail to perform the duties which the residue of the section imposes, but the only penalty directly expressed is that contained in the initial clause just noted. No inference is, however, to be drawn from this, that the residue of the section is not to be obeyed, for certainly the duties it enjoins are clearly set forth. The framers of the constitution were evidently of the opinion that they might safely intrust the supervision of the details specified in the remaining clauses of the section to the members of the general assembly, or else they would have never ordained that any member might by his objection impede the progress of legislation and arrest the signature of the presiding officer to the pending bill on the ground that some unwarranted omission, substitution or insertion had occurred, or that some provision of the constitution had been violated. *Hercin lies*, in our opinion, the only *constitutional corrective* for a failure to observe the provisions of the remaining clauses of the section under discussion and to yield a ready obedience to them.

If it be said that this construction leaves it optional with the Legislature whether they shall comply with the explicit commands of the other clauses of the section, the

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obvious reply is, that *confidence must be reposed somewhere*; that the very nature of republican government demands and presupposes it; that if the trust thus reposed is not well founded; that if integrity is not to be found among the legislative representatives of the people, it would be but an easy matter by a *simulated observance of constitutional forms in the registry of falsehoods upon the journals*, to evade and defeat the most rigid provisions of the organic law that the wit of man is capable to devise.

As no objection or protest is "noted upon the journal" of either branch of the general assembly, the only natural and reasonable conclusion for us to reach is that benign conclusion of the law itself, sanctioned by the wisdom of ages, which presumes in favor of *right*, and not in favor of *wrong*. Similar presumptions are daily indulged in respecting *judicial* proceedings, and no reason occurs why a similar liberality of inference should not obtain in regard to *legislative* proceedings in many instances. Viewing the subject in this light, we regard it unimportant that the journals of the respective houses do not disclose that strict observance of formality which should properly attend the passage of a bill through its various legislative stages, as, for instance, that the presiding officer suspended all other business and declared that such bill would then be read, and that, if no objections were made, he would sign the same, to the end that it might become a law, nor that the bill was immediately sent to the other house. Counsel for respondent fails to observe that section 37, while requiring these things to be done, and these forms to be observed, nowhere requires that they be noted on the journal; the only facts requisite to be noted there, as specified in that section, being that of the signing of the bill and of any protest that may be offered.

But it is persistently urged that the statute never became a law because the journals do not show that the bill

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3. LEGISLATIVE PRO- was "signed by the presiding officer of each
CEEDINGS AND house in open session." The remarks made
JOURNALS: bills to be signed in open session.

above as to presumptions, are equally applicable in this instance. But further with regard to that matter: The journals of the respective houses show, in the fullest and most unexceptionable manner, that section 31, of article 4, providing that "no bill shall become a law unless on its final passage the votes be taken by yeas and nays, the name of the members voting for and against the same be entered in the journal, and a majority of the members elected to each house be recorded as voting in its favor," met with the strictest compliance. And the last entry on the senate journal in respect to the bill is that made May 17th, in these words: "Substitute No 1, for senate bill No. 75, was taken up, read at length by the secretary and signed by the president, no objections being made." A like entry appears on the house journal of date May 19th, as follows: "Senate substitute No. 1 for senate bill No. 75, entitled an act to amend and revise chapter 2, title 2, of the General Statutes of Missouri, concerning popular elections, was taken up, read at length by the clerk and signed by the speaker *pro tem*, without objection." It is true that neither journal discloses *totidem verbis* that the bill was "signed in open session," nor was this necessary, because that it was so signed is clearly apparent from other entries in the journals, both preceding and succeeding the one in question, that each house was in "open session" when the signatures of the respective officers were affixed to the bill. So that the denial on this point contained in respondent's answer is plainly unsupported by the evidence, and, together with the argument based thereon, falls to the ground.

III. It only remains to determine whether section 38, *supra*, has been violated. That section, so far as necessary to be quoted, is as follows: "When the bill
4. ———: ———: presenting bills to governor. has been signed, as provided for in the preceding section, it shall be the duty of the secretary of the

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senate, if the bill originated in the senate, and of the chief clerk of the house of representatives, if the bill originated in the house, to present the same in person on the same day on which it was signed as aforesaid, to the governor, and enter the fact upon the journal." Both houses of the general assembly adjourned on the 20th day of May *sine die*, and it is pressed upon our attention that as the bill originated in the senate, it was the duty of the secretary of that body strictly to comply both as to time and manner with the provisions of the foregoing section and to enter the fact of such compliance upon the journal; and that, since the journal does not show this was done, the bill has not become a law. It was doubtless the clear duty of the secretary of the senate to do as respondent claims and as the constitution enjoins; but the question for consideration is: What are the consequences to flow from his failure to note the fact of a duty performed upon the journal.

We do not regard respondent's position tenable, because not regarding the section as mandatory; and these are our reasons, therefor: "If *mandatory*, then no matter what the circumstances, the bill must be delivered *in person* by the clerical officer of the house in which it originated on the *very day* of its passage, and that fact entered upon the journal, or else the bill, passed after many days of anxious, arduous legislative labor, with all the solemnities, and authenticated by all the formalities ordained by other sections of the constitution, could be defeated by the sickness or absence of the governor, or the misfeasance, malfeasance, sickness, absence or death of the officer on whom is enjoined the personal delivery of the bill, or, as frequently occurs, by the bill having been put upon its final passage a few minutes before midnight. When such consequences as these are to attend such a construction as that insisted upon, we may well hesitate before giving that construction our sanction.

The cases cited for respondent are instances where

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some prohibitory provision of the constitution had been violated during the *passage* of the *bill*, as by the journals failing to show that the ayes and noes were taken, and a concurrence had of a majority of the members-elect in each house. Here, before the duties of the secretary of the senate began, the *process of legislation had ceased*, and during its passage, the bill had, as before seen, successfully run the gauntlet of constitutional prohibitions. Besides, while section 31, *supra*, is careful to provide that no bill shall become a law unless the journal bears witness to a due observance of certain formalities, and while section 37, *supra*, contains a like prohibitory provision, section 38, neither expressly nor impliedly says that fatal consequences shall attend the failure of the proper official to do his duty, and make entry thereof upon the journal. This view would seem to be entirely conclusive that section 38 was only designed to be directory.

As to the argument that it is "left to conjecture" how the bill reached the governor, since the journal contains no recital of its delivery, it is enough to say that the message of the governor transmitting the bill in question to the secretary of State with his approval recites that the bill had been presented to him, and the legal inference is that it was properly presented, both as to time and manner, and therefore, we certainly shall not in this instance reverse all ordinary presumptions by presuming that what appears to have been fairly and rightfully done was surreptitiously or fraudulently done. Such a ruling would be at variance with all rules of evidence hitherto announced.

These considerations induce us to pronounce the statute valid and award a judgment of ouster. All concur.

Maschek v. St. Louis Railroad Company.

MASCHEK V. ST. LOUIS RAILROAD COMPANY, *Appellant.*

Negligence, A case of, Defeating Recovery on the part of the Plaintiff. In an action against a street railway company to recover damages for the killing of plaintiff's child by defendant's car, the facts appeared, by the testimony of plaintiff's witness, to be as follows: The car was moving at a moderate rate of speed on a slightly down grade, and witness was standing beside the driver, when he heard the driver shout, "look out," "hold on," or "stop." Turning, he saw plaintiff's child, (a boy three years old,) about six feet ahead of the car-mules and four feet from the track, and running toward the track. The driver, with his right hand on the brakes and his left pulling on the lines with such force that the tongue went up over the heads of the mules, was doing his best to stop the car. The child ran to the middle of the track, where he was overtaken and crushed by the car. The whole transaction seemed to the witness to have occurred "in a moment." There was no positive proof that the driver saw the boy at all before he hallooed; *Held*, that on this state of facts the plaintiff was not entitled to recover.

Appeal from St. Louis Court of Appeals.

REVERSED.

Smith P. Galt for appellant.

Jos. Jecko for respondent.

NAPTON, J.—The only point made in this case which is thought by this court necessary to be decided is, whether the demurrer to the plaintiff's evidence should have been sustained. It is conceded that if the testimony conflicts, or if there is any from which a jury may fairly deduce a liability, the case must go to the jury. But where there is no evidence to authorize a verdict, and it can only be traced to that sympathy which jurors, and I may add judges, too insensibly feel for the weak in a contest with the powerful, we have heretofore considered it the duty of this court, however distasteful it may be, to interfere. The conclusion we have reached on this point renders unnecessary any investigation of the other two points made by the appellant, de-

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fendant below, in regard to the rejection of certain questions put by him during the trial, and in regard to the rejection of an instruction concerning accident or misadventure.

There was no evidence offered by the defendant in this case, and the principal witness for the plaintiff, indeed it might be said the only one of any importance, was a passenger on the car by the name of McIlvain. He was returning from his residence to the post-office, where he was a clerk, and was standing by the driver when the accident occurred, about one o'clock. The grade of the track on Carondelet avenue, at the point where the child was killed, was slightly on the decline going north. Witness was on the west side of the driver, and hearing the driver shout "look out," "hold on," or "stop," he turned his face toward the east, and saw the little boy running for the track about six feet ahead of the mules and four feet east of the track, the driver with right hand on the brakes and his left pulling on the lines with such force that the tongue went up over the heads of the mules. When the driver shouted to the boy, he kept right on until he got to the middle of the track, where he turned his face north, got under the tongue which was thrown up by the pull of the driver, until he got to the axle, or where the tongue was so low that it struck him, and he fell on his face and was run over by one of the hind wheels. The driver was all this time trying his best to stop the car, and it appeared to the witness that all this occurred in "a moment."

The question of negligence in the driver must be solved by an answer to one of two questions. What did the driver do which he ought not to have done, or what did he omit to do which he ought to have done? The only hypothesis upon which the assumption of negligence can be based, is that the driver did not shout, ply the brake, and pull on the mules as soon as he ought. He could do nothing more than what he did, but if he waited too long when he had an opportunity of doing those things

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sooner, it was negligence. Is there any evidence to show this or that could lead to such a conclusion? There was no positive proof that he ever saw the little boy till he hallooed; but suppose he saw him when he first left the sidewalk. Of course it will not be pretended that whilst the child was on the sidewalk, the driver had any right to imagine that he would undertake to cross the street, but when he left the sidewalk he was eleven feet from where he was when McIlvain first saw him. How long would it take this little boy three years old, dressed in coat and pants, and not in a frock, to run eleven feet?

All of the transaction which the witness McIlvain saw, he says occurred "in a moment." How many moments must have passed before McIlvain saw him after he started from the curbstone on a run? And how many moments transpired before McIlvain's attention was turned by the shouts of the driver, after the driver had commenced plying the brakes and pulling on the mules? The driver, it appears, without contradiction, was steady and perfectly sober; the mules were on a slightly down grade, and going in a moderate trot. The recklessness of the little child, which is obvious, was no excuse for negligence in the driver, if there was any, but we confess our inability to discover any proof of negligence and, therefore, must in accordance with our uniform practice, reverse the judgment. The other judges concur.

MAUPIN, *Appellant*, v. GRADY.

Equity; VENDOR'S LIEN: INFANCY. The trustee in a deed of trust given to secure a debt, being about to sell the land for default of payment, the defendant R., who was at the time a minor, agreed with the creditor that if A. would buy at \$300 or more, he would give his note for the balance of the debt. A. bought at \$300, and paid the purchase money, which was applied upon the debt. R. then executed his note according to the agreement. Afterward, R.

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having become of age, A. sold and conveyed the land to him. R.'s note being unpaid, this action was brought to obtain a personal judgment against him, and to subject the land to its payment. *Held*, that it would not lie. The creditor was not entitled to a vendor's lien; for the land was fully paid for by A. Neither could the principle be applied, that infancy cannot be invoked as a defense so long as the party holds on to the fruit of the contract; for the note was not given for the land.

Appeal from Howard Circuit Court.—HON. G. H. BURCKHARTT, Judge.

AFFIRMED.

At the date of the sale by McCorkle, trustee, R. G. Maupin was the owner of the note for \$386.25, secured by the deed of trust.

J. M. Reid for appellant.

Herndon & Herndon for respondent.

HENRY, J.—The petition states that, by their promissory note, dated February 2nd, 1874, the defendants promised to pay plaintiff's intestate \$127.65, one day after its date, with interest at the rate of ten per cent per annum, and that said note was given for the payment of part of the purchase money for the following described real estate in Howard county, to-wit: north part of the west half of the northwest quarter of section 19, township 50, range 17, containing about sixty-six acres. Plaintiff asks judgment for the amount of the debt, and that the land be subjected to sale for its payment. The separate answer of Robt. S. Grady, one of the defendants, denied that the note was given for the payment of the purchase money for the land described in the petition or any part thereof, or that plaintiff's intestate ever sold said land to defendants or either of them; alleges that the note was fraudulently obtained from defendants, and pleads his infancy at the date of the note as a defense. The separate answer of Char-

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lotte Grady, the other defendant, is to the same effect, except as to fraud and infancy. The reply denied the allegations in each of the separate answers. There was a finding and judgment for plaintiff against Charlotte Grady for the amount of the note, and in favor of Robt. S. Grady for costs. From that judgment the administrator has appealed.

On the 21st day of March, 1870, John and Charlotte Grady executed a deed of trust conveying to John McCorkle, the interest they then had or should afterward "acquire, in and to the real estate of William Grady, deceased, or any other part of the estate that may ever belong to, or come to us in anywise." This was a trust deed to secure a promissory note executed November 19th, 1869, by the grantors and R. G. Maupin, the plaintiff's intestate, for \$386.25, payable one day after its date to Otho Ashcraft. In default of payment the trustee was empowered to sell, &c. On the 2nd day of February, 1872, the trustee sold the land described in said deed at public sale, in pursuance of the terms of the deed, and Otho Ashcraft purchased it at the price of \$300, which was less than the debt by \$127.65, the exact amount of the note executed to R. G. Maupin by the defendants herein. The interest of Charlotte Grady in the land sold was her dower as widow of William Grady, deceased, and the interest of John, the other grantor in said deed of trust, was one-fifth, subject to his mother's dower estate. Charlotte was an old lady sixty years of age, and she and Robert before the sale agreed with Rice G. Maupin, plaintiff's intestate, to give him their note for the balance of the debt, if Ashcraft purchased the land at \$300, or more. Ashcraft paid the amount of his bid and received a deed for the land. He was a son-in-law of Mrs. Grady and guardian of Robert S., who was a minor at the date of the note here sued on. After he became of age Ashcraft sold and conveyed to him the land. There was no arrangement between Ashcraft and Robert and Charlotte Grady or either of them, that

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Ashcraft should buy the land for them, or either of them. There is no principle of law which gives Maupin a vendor's lien on the land, for the money due him on the note of Charlotte and Robert Grady. When the land was sold under the deed of trust and purchased by and conveyed to Ashcraft, all of Maupin's interest therein was extinguished. The note was not given for the land. The entire purchase money for the land, \$300, was paid by Ashcraft. The note executed by Robert and Charlotte Grady was given for the balance of the debt due on the note secured by the deed of trust, and not for the land, to which they acquired no right or title whatever. Robert was a minor and his defense of infancy was properly allowed. The doctrine that he cannot resist the payment of the note, while he holds the property for which it was given is not applicable; because the note was not given for property, but to pay the balance of a debt due from his brother John and his mother. The judgment of the circuit court is affirmed. All concur.

THE CITY OF KANSAS, *Appellant*, v. FLANDERS.

1. **City Dramshop License in Kansas City:** MANDAMUS. The City of Kansas had power under its charter, (Acts 1875, p. 205, art. 3, § 1,) to enact the present ordinance requiring every dramshop keeper to take out a city license; and it is no defense to a prosecution for failure to do so, that the city auditor has wrongfully refused an application to issue one. If the refusal was wrongful, the applicant has his remedy by mandamus.
2. ——. The ordinance of Kansas City which requires every person desiring a city license to keep a dramshop, first to obtain "the written consent of a majority of the property owners within the block or square," is valid.

Appeal from Jackson Criminal Court.—HON. H. P. WHITE,
Judge.

REVERSED.

Wash. Adams for appellant.

Respondent not represented.

SHERWOOD, C. J.—Defendant was brought before the city recorder, charged with keeping a dramshop contrary to city ordinance, convicted, and appealed to the criminal court of Jackson county, in which court the cause was submitted on an agreed statement of facts, to the effect that defendant, at the time specified in the complaint, had a license from the county, but none from the city, though the previous year he had a license from the city; that he presented to the auditor of the city a petition signed by a majority of the tax paying citizens in the block and square in which the dramshop was located, tendered the requisite amount and demanded a license, which the auditor refused to issue. Upon this agreed statement a declaration of law in the nature of a demurrer to the evidence was given, and the defendant adjudged not guilty.

The question thus presented is whether the defendant, having admitted an infraction of the ordinance of the city, is entitled to be held guiltless and discharged from all punishment. The facts being admitted, the case hinges on the validity of the ordinance, and this, in turn, rests upon the terms and provisions of the city charter. An examination of those provisions leaves no doubt as to the power of the city to pass suitable ordinances for licensing dramshops, and an inspection of the ordinance, as preserved in the bill of exceptions, leaves no doubt that this power has been duly exercised.

The fact that a county license for keeping a dramshop in a city may issue upon petition of a "majority of the tax-paying citizens," in the block or square wherein the dramshop is to be located, (1 Wag. Stat., § 8, p. 551,) by no means militates against the right of the city to issue license also. If the city cannot do this, then confessedly, the rights and powers conferred by the charter, and the

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ordinances of the city passed in pursuance thereof, are indeed but vain and nugatory. The power of cities to license dramshops has never before been questioned in this State; on the contrary, has been frequently, though indirectly, recognized. *State v. Harper*, 58 Mo. 530, and cases cited.

It can not be ascertained from the ruling of the criminal court, whether that ruling was based on the invalidity of those sections of the ordinance requiring a person to take out a license to keep a dramshop and imposing a fine for failure in this regard, or whether that ruling had its origin in the opinion that section 54 of the ordinance, requiring a person desiring a license for such a purpose, should first obtain "the written consent of a majority of the property owners within the block or square," was in conflict with the provisions of section 8 of the General Statutes, before noted.

If those sections requiring a license to be obtained, and punishing any default in this particular, are to be held valid, and we, on inspection of the charter of the city, have not the slightest reason to doubt their validity, then it must needs follow, that the defendant is guilty as charged; and this is true whether that section of the ordinance requiring the written consent of a majority of the "property owners" be valid or not. For it has been held in relation to a failure to obtain a license from a county, that it mattered not what was the reason of the refusal to grant the license, that "punishment must follow an infraction of the law, regardless of the reason which prevented a license from being obtained, or the motive actuating the officer who, in dereliction of his duty, refused to grant it." *State v. Meyers*, 63 Mo. 324, and cases cited. The same rule must also obtain in case of failure to secure license from the city, the reason for the rule in each instance resting upon the same foundation, *i. e.*, that an infraction of duty on the part of the license-granting officer, can by no possibility authorize

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or cure an infraction of law on the part of the applicant for license. If the official prove recalcitrant, the remedy against him by *mandamus* is prompt and efficient. *Austin v. State*, 10 Mo. 591. But it is wholly immaterial to this case whether the law provides any remedy or not, since nothing but the granted license confers immunity from punishment. *State v. Jamison*, 23 Mo. 330.

We discover no valid objection to section 54, *supra*, because the right to issue a license carries with it, as an
2. — obvious incident, the prescribing of the conditions precedent to its issuance; and there is nothing unreasonable in the provisions of that section, nor in conflict with those of section 8, *supra*. The long and the short of the matter is simply this, that a certain method for obtaining a license from the county is prescribed by the general statutes, and a certain other method, the full equivalent of the former in point of legality, is prescribed by the ordinance of the city. Moreover, even if there were conflict between the general law and the ordinance; the charter of the city, if taken literally, taken as it appears, both in the statutes of 1875, (article 3, section 1, subdivision 33, page 207,) and on the legislative roll, would undoubtedly prevail; for that subdivision provides that: "In addition to the powers specially enumerated and conferred in the foregoing provisions of this section of this act, the common council shall have the further power to pass, publish and amend and repeal all ordinances, all rules and police regulations, in harmony with the constitution and laws of the United States, and the constitution of this State." Taking the letter of the charter as our guide; taking it as it is written, it is quite plain that the only touch-stone provided by the charter for the ordinances of the city, is the constitution of the State. We make no ruling as to the proper construction of the subdivision just quoted, we merely notice it in passing, as an instance of the singular carelessness sometimes exhibited in drafting a statute.

Turner v. Drake.

For the errors aforesaid, the judgment is reversed and the cause remanded, with directions to the criminal court to proceed in conformity hereto. All concur.

TURNER, *Appellant*, v. DRAKE.

Fraudulent Ballots, Statute Against: CHARACTER OF BALLOTS, A QUESTION OF FACT, NOT OF LAW. The design of the act of 1875 prescribing the form of ballots, (Sess. Acts, p. 51, § 1,) is to prohibit the use of any words in the caption to a ballot which do not truly indicate the political character or party affiliation of the persons to be voted for, and any ballot which represents, by the words used in the caption, that it is the ticket of one party, when, in truth and fact, the persons whose names are contained in the body of the ballot represent another and different party, is, under the statute, fraudulent and void. Whether the caption truly indicates the political character of the ballot is a question of fact, upon which the finding of the lower court will not be reviewed by this court.

Appeal from Carroll Circuit Court.—HON. E. J. BROADDUS,
Judge.

AFFIRMED.

L. H. Waters and Hale & Eads for appellant.

The record shows that there was a democratic State and county ticket and a greenback county ticket upon which no names appeared as candidates for treasurer and prosecuting attorney. The names of two gentlemen who were independent candidates for those offices were printed upon the ballots in question, with the word "independent" opposite each name. This nondescript was tacked to the state republican ticket, and over all was the caption "republican," "independent," "greenback." Did that caption "express the political character of the ballot?" The state ticket was republican, the county ticket was not. The county ticket was greenback, the state ticket was not.

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The use of the name "republican" in the caption was clearly without authority.

R. D. Ray and *M. C. Shewalter* for respondent.

NORTON, J.—This is a proceeding instituted in the county court of Carroll county, contesting the election of defendant as recorder of deeds of said county. The county court quashed the notice of contest on the motion of defendant, from which action plaintiff appealed to the circuit court, where, upon a trial *de novo*, judgment was rendered for defendant, the notice of contest quashed and the proceeding dismissed, from which plaintiff has appealed to this court.

The only ground for contest alleged in the notice is that all the ballots cast for defendant at the election which was held on the 5th day of November, 1878, were fraudulent and void, because the caption of said ballots contained the words: "Republican, Independent, Greenback." The following is the form of the ballot as to State and county officers: "Republican, Independent, Greenback—Supreme Judge, Alexander F. Denny; Superintendent of Public Instruction, Roderick Baldwin; Register of Lands, Wm. N. Norville; Railroad Commissioner, John P. Tracy; for Congress, — — —. County ticket—Representative, Thomas H. Ballew; Circuit Clerk, Joseph H. Oatman; County Clerk, Josiah Farrington; Recorder of Deeds, James E. Drake; Sheriff, Charles A. Scott; Collector, Henry B. Turpin; Treasurer, (Independent,) J. S. Plunkett; Assessor, George Vaughn; Judge at Large, Wm. A. Prosser; Judge, Eastern District, William Kimble; Judge, Western District, William Renzleman; Prosecuting Attorney, (Independent,) T. J. Whiteman; Coroner, Dr. John Logan."

The claim that the ballots cast for defendant, of which the foregoing is a type, were fraudulent and void, is based upon section 1, Acts of 1875, page 51, which is as follows:

"Each ballot may bear a plain written or printed caption thereon, composed of not more than three words, expressing its political character, but on all such ballots the said caption, or head lines, shall not, in any manner, be designed to mislead the voter as to the name or names thereunder. Any ballot not conforming to the provisions of this act shall be considered fraudulent, and the same shall not be counted."

We cannot, from the mere face of the ballot, declare, as a matter of law, that the words used in the caption were, in any manner, designed to mislead the voter as to the name or names thereunder. The words employed would indicate to the voter that he would find among those to be voted for republicans, greenbackers and independents, or persons who were candidates without any party indorsement. We think the evident purpose of the Legislature in the above enactment was to prevent one political party from using, as a caption to its ballots, the name of any other political party, while the persons to be voted for, whose names are inserted in the body of the ballots, belong to a different party from that mentioned in the caption. A ballot with a caption using the words "The Republican Ticket," which contains only the names of persons who represented the democratic ticket, would fall within the class of ballots interdicted by the law.

The design of the statute is to prohibit the use of any words in the caption to a ballot which do not truly indicate the political character or party affiliation of the persons to be voted for, and any ballot which represents, by the words used in the caption, that it is the ticket of one party, when, in truth and fact, the persons whose names are contained in the body of the ballot represent another and different party, is, under the statute, fraudulent and void. We cannot, as a matter of law, declare that the ballots in question, upon their face, are fraudulent and void, because we cannot know until the fact is disclosed by evidence that the political character of the persons whose names are in

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the body of the ballots is not truly indicated by the words used in the caption. The question as to whether the words in the caption of the ballot truly indicated its political character, is one of fact to be determined by the evidence, and as the court, to which this question was submitted, without a jury, after hearing all the evidence, found, as a fact, that the caption to the ballots in question was not, in any manner, designed to mislead the voters, and in fact did not mislead them, its finding is conclusive, it not being the province of this court to weigh the evidence or disturb the judgment on the ground that it is against the preponderance of evidence. *Steinberg v. Gebhardt*, 41 Mo. 521; *Blumenthal v. Torini*, 40 Mo. 159; *Gillespie v. Stone*, 43 Mo. 351.

This view of the case renders it unnecessary to consider the question presented as to the sufficiency of the notice of contest, as the court, after hearing all the evidence, determined that the notice did not state any valid ground for the impeachment of the ballots therein mentioned. Judgment affirmed, with the concurrence of the other judges.

THE STATE V. BARTON, *Appellant*.

1. **Competency of Juror who has formed an Opinion.** One of the persons summoned as jurors, on his examination on the *voir dire*, said: "I have heard the case talked about a good deal. I have read the publications in the St. Charles papers with reference to the case, and from what I have heard about the matter, I have formed and still retain an opinion as to the guilt or innocence of the defendant. I have not talked with any of the witnesses or any one who pretended to know the facts in the case. I formed my opinion from what I read in the newspapers and conversations I've had with others about the case. I can hear the evidence and render a fair and impartial verdict in the case regardless of such opinion. I have at this time no bias or prejudice against the prisoner, from what I have read or heard, which would prevent my giving

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him a fair and impartial trial after having heard the evidence." He further said that "It would take evidence to remove the opinion thus formed." *Held*, that he had not such a fixed opinion as disqualified him to serve as a juror on the trial of the case. (Following *State v. Corb*, 70 Mo. 491, and other cases.) HENRY and HOUGH, JJ., dissenting.

2. **Criminal Law:** PUNISHMENT OF YOUTH UNDER SIXTEEN. Section 15, article 9 of the statute concerning crimes and punishments, provides: "Whenever any person under the age of sixteen years shall be convicted of any felony, he shall be sentenced to imprisonment in a county jail, not exceeding one year, instead of imprisonment in the penitentiary, as prescribed by the preceding provisions of this law." *Held*, that this section makes imprisonment in the county jail a substitute for imprisonment in the penitentiary only, not for the death penalty.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

T. G. Johns and C. W. Wilson for appellant.

J. L. Smith, Attorney-General, for the State in argument cited as to the competency of the jurors, *State v. Baldwin*, 12 Mo. 223; *State v. Davis*, 29 Mo. 391; *State v. Rose*, 32 Mo. 346; *State v. Lawrence*, 38 Iowa 51; *State v. Bryan*, 40 Iowa 379; *State v. Williams*, 3 Stew. (Ala.) 454, 465; *Rice v. State*, 7 Ind. 332; *State v. Sater*, 8 Iowa 420; *Sanchez v. People*, 4 Park. Crim. R. 535, 553; *People v. Brown*, 48 Cal. 253; *O'Connor v. State*, 9 Fla. 215.

NAPTON, J.—The defendant in this case was convicted of murder in the first degree. The evidence and instructions are not preserved in the record, and the only points presented for our consideration are two:

First. The admission by the court on the panel of jurors of two persons, who, on their *voir dire*, admitted that they had formed an opinion from rumor, but stated that they could give a fair and impartial verdict in the case, regardless of such opinion; that they had no prejudice or bias

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against the prisoner, and would be governed by the testimony. One of the jurors further said that it would take evidence to remove the opinion thus formed. The court overruled the objections, and the defendant's counsel excepted. This point has been considered and decided at the present term in the case of the *State v. Core*, 70 Mo. 491, and the previous cases referred to and reviewed. I may add that, in the *State v. Davis*, 29 Mo. 392, the precise words used by one of the jurors in this case, "that it would require evidence to remove the opinions they had entertained," were also used by the jurors in that case, who were pronounced by this court competent. We regard these decisions as settling the law in this State.

The second ground upon which we are asked to reverse the judgment is the refusal of the court, after conviction, to sentence the defendant to imprisonment in the county jail, it having been found by the court that he was, at the time of committing the murder, under sixteen years old. The statute on which this motion is founded is as follows: "Whenever any person under the age of sixteen years shall be convicted of any felony, he shall be sentenced to imprisonment in a county jail, not exceeding one year, instead of imprisonment in the penitentiary, as prescribed by the preceding provisions of this law." This section seems capable of but one construction, and that is to require imprisonment in a county jail as a substitute for imprisonment in the penitentiary, where such offenses as were punishable by imprisonment in the penitentiary have been committed by a youth under sixteen. A felony punishable by death is not within the letter or meaning of the statute. The judgment must be affirmed. A majority of the court concur. HENRY and HOUGH, JJ., dissent.

HENRY, J., DISSENTING.—The bill of exceptions shows that on his examination on the *voir dire* touching his competency as a juror, George H. Snyder, one of the panel of

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forty, answered: "I have heard the case talked about a good deal. I have read the publications in the St. Charles papers with reference to the case, and from what I have heard about the matter, I have formed and still retain an opinion as to the guilt or innocence of the defendant. I have not talked with any of the witnesses or any one who pretended to know the facts in the case. I formed my opinion from what I read in the newspapers and conversations I've had with others about the case. I can hear the evidence and render a fair and impartial verdict in the case regardless of such opinion. I have at this time no bias or prejudice against the prisoner, from what I have read or heard, which would prevent my giving him a fair and impartial trial after having heard the evidence." He further said that "It would take evidence to remove the opinion thus formed." A challenge of this juror for cause was disallowed by the court.

To sustain the action of the court in disallowing the challenge, *Baldwin v. State*, 12 Mo. 225; *State v. Davis*, 29 Mo. 397, and *State v. Rose*, 32 Mo. 355, are relied upon. When this question was under consideration before, in the *State v. Core*, 70 Mo. 491, the court supposed the question to have been settled by the *State v. Rose*, but on a critical examination of that case, I am satisfied that so far from determining the question now before us in favor of the State it is an authority to the contrary. *Baldwin v. State* entirely fails to sustain the competency of the jurors in this case. There the juror said: "That he saw statements in the New Orleans public papers in regard to the transaction; that from these he formed an opinion and believed that, if the statements were true, he has an opinion as to defendant's guilt or innocence, but he had no prejudice or bias against defendant; that his opinion is now unchanged, if the facts are as stated; that he would be governed solely by the evidence; that he had not conversed with witnesses." He was held to be a competent juror, and the court also said that it was not the province of the juror to

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pass upon his competency, but for the court to determine upon the facts whether he was biased or prejudiced or not. But the answer of the juror there and of the juror here is totally different. In that case, the opinion formed was entirely hypothetical. It did not indicate a belief that the facts were as heard. It does not show any impression upon the mind which it would require evidence to remove. But here, the statement of the juror shows that, although his opinion was formed upon rumors alone, the impression of the guilt or innocence of the accused was such as would remain until removed by evidence.

In the *State v. Davis*, all that appears in the opinion of the court on the subject is as follows: "The objection to the competency of the jurors cannot be sustained. The jurors were examined on their *voir dire*, and stated that they had formed an opinion, but it was upon rumor, and was not such as would bias or prejudice their minds. This has long been the law of this State, and such jurors have invariably been held competent." We have taken the trouble, however, to examine the record in that case, and it does not appear that the juror said it would require evidence to change the opinion he had formed; and, although this was urged by the counsel as rendering the juror incompetent, singularly enough, it was not noticed by the court in its opinion. But, conceding that it is an authority in support of the views entertained by a majority of this court, it is a solitary case in this State and opposed to the great weight of authority in the United States, as we shall endeavor to show; and, although cited in argument in the *State v. Rose*, was disregarded. In the *State v. Rose*, the court said: "The case of the juror Turner comes fully within the exceptions in that section," (section 14 of the revision of 1855, page 1191, the same as section 1,897, Revised Statutes 1879,) "and he was a competent juror, and the court committed no error in refusing to strike his name from the list. When E. B. Davis, another of the panel of thirty-six was examined, he stated that he had formed and

expressed an opinion, that his opinion was formed on rumor, but he did not think it would be in his way of giving the accused a fair and impartial trial according to the law and evidence, regardless of the opinion he had formed; that he had the same opinion still, and that it would take evidence to remove it. The defendant moved the court to strike his name from the panel, which the court overruled. The name of the juror does not appear on the list of the panel of those who tried the case, nor does it appear that he was challenged, either for cause or peremptorily, nor anything from which it can be inferred that the defendant suffered any injury by his being retained on the list of thirty-six. His case does not come within the exception of the clause of the statute above quoted. It does not appear affirmatively that his opinion was not such as to prejudice or bias his mind, and in that does not fulfill the requirement of the statute; but, as he was not on the jury which tried the case, and the defendant was not otherwise injured by the action of the court in reference to him, there is in it no reason to reverse the judgment."

The juror's answer, but for that portion of it in which he stated that it would take evidence to remove his opinion, did not render him incompetent, and it was evidently with reference to the statement that it would take evidence to remove his opinion, that the court remarked: "His case does not come within the exception of the clause of the statute above quoted. It does not appear affirmatively that his opinion was not such as to prejudice or bias his mind, and in that does not fulfill the requirements of the statute; but, as he was not on the jury which tried the case, and the defendant was not otherwise injured by the action of the court in reference to him, there is in it no reason to reverse the judgment." In other words, he was an incompetent juror, but he was not challenged for cause or peremptorily, and was not of the twelve who composed the jury which tried the case, and therefore defendant was not prejudiced.

Section 1,897 of the Revised Statutes of 1879, which

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has been substantially the same in all the revisions of the statutes since 1835, provides that: "It shall be a good cause of challenge to a juror that he has formed or delivered an opinion on the issue or any material fact to be tried; but, if it appear that such opinion has been founded only on rumor and newspaper reports, and not such as to prejudice or bias the mind of the juror, he may be sworn." The law allows the accused a given number of peremptory challenges—challenges for whim or caprice—and if the court retain incompetent jurors on the panel from which the twelve are to be selected, the accused may be compelled to exhaust his peremptory challenges on those whom the court should have excluded, and thus, in effect, be altogether deprived of such challenges, and the doctrine of the court in the *State v. Rose*, in that particular, is unsound, as this court has heretofore held.

By the statute of 1825, (section 12, page 880, Revised Statutes 1825,) it was provided that it should be "a good cause of challenge to a juror that he had formed or delivered an opinion in the cause or concerning the matter in controversy," and thus the law stood until the revision of 1835, when it was amended by adding, "but if it appear that such opinion is founded only on rumor, and not such as to bias or prejudice the mind of the juror, he may be sworn," and such has substantially ever since been the law in this State. The statute recognizes that one may be incompetent as a juror, who has formed an opinion upon rumor or newspaper reports alone. It shall be cause of challenge to a juror, as it was in 1825, that he has formed or delivered an opinion on the issue, &c., whether such an opinion be formed from the knowledge of facts, or from having heard them from witnesses, or upon rumor, but in the latter case, if it appear that the opinion is not such as to bias or prejudice the mind of the juror, he may be sworn. It must affirmatively appear that it is not such as to prejudice or bias. The first clause makes all who have formed opinions incompetent, and the second clause is an excep-

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tion, and the facts which bring the juror within the exception must affirmatively appear. Appear to whom? To the juror? Certainly not, but to the court. It was so held in the *State v. Baldwin*. The court there said it was not the province of the juror to pass upon his competency, but for the court to determine the question upon the facts.

In that case the juror was held competent, but his answer was materially different from that of the jurors in this case. His opinion was entirely hypothetical. It did not indicate a belief that the facts were as heard, or show any impression upon the mind which it would require evidence to remove. But here the statement of the juror was that, although his opinion was formed upon rumor alone, the impression of the guilt or innocence of the accused was such as would remain until removed by evidence. Is there no difference between the state of that man's mind who answers that he has heard rumors, and, if the facts be as he has heard them, he has an opinion formed, and of the mind of him who says: I have heard the facts from rumors, and have formed an opinion, and it will require evidence to change the impression made upon my mind? When the juror answers that it will require evidence to change his impression or opinion, he cannot mean that on the state of facts upon which his opinion was formed it would require evidence to change this opinion, but evidently that it would require evidence to establish a different state of facts. To borrow an illustration from the opinion of Williams, J., in the *State v. Potter*, 18 Conn. 171: "A house is broken open in the night season and plundered; the thief for a time is unknown; when taken and brought to trial, it could render a juror, a biased juror, that he had said and believed that a burglary had been committed in that house, if the facts were true," and we may add, no evidence on earth would change his opinion, that on those facts a burglary had been committed. If he had not only said that, but in addition, that he had heard that the accused was seen coming out of the house that night

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with property taken from the house, and if these facts were true, he believed him guilty of burglary, that would be a hypothetical opinion; but if he should also say that he believed those facts, and upon them had formed an opinion that he was guilty, or that it would require evidence to remove the impression of guilt which those facts had made upon his mind, could it be said that such a juror was unbiased?

The same learned judge also observed in that case: "And we are certainly not prepared to say that an opinion formed upon the case or an essential part of the case, such as it would require evidence to remove, would not disqualify a juror." If the juror does not believe the facts, and yet has formed an opinion as to the guilt or innocence of the accused which it will require evidence to remove, he has prejudice and is unfit for a juror, and his declaration that he has no prejudice, is contradicted by the circumstance that, without knowing or believing any facts, except the simple fact that a homicide was committed, he has formed an opinion which it will require evidence to change. If, on the contrary, he believes the facts he has heard, and upon these facts has formed an opinion that the accused is guilty which it will require evidence to remove, he is biased and incompetent to sit as a juror in the case.

Bias and prejudice are not synonymous terms. Webster defines these words as follows: "Prejudice—to prepossess with unexamined opinions, or opinions formed without due knowledge of the facts and circumstances attending the question; to bias the mind by hasty and incorrect notions, and give it an unreasonable bent to one side or other of a cause. Bias—a leaning of the mind; inclination; prepossession; propensity toward an object, not leaving the mind indifferent."

If the opinion formed by the juror be such as to bias or prejudice his mind, he should not be sworn. That is clearly the meaning of the statute. Suppose he answers that he has formed an opinion based upon rumor alone,

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which it will require evidence to change, and does not state whether he is or is not prejudiced or biased, could the court hesitate to strike him from the panel? His statement that he is not biased or prejudiced is wholly immaterial under the decision in the *State v. Baldwin, supra*. It is for the court to declare, on the facts ascertained, whether he is biased or not.

In the *State v. Benton*, 2 Dev. & Bat. 196, is a very able discussion of the subject by Gaston, J., without reference to the statute prescribing a test, and the following remarks are so appropriate that I have thought proper to quote them: "We there see the opinion described as one formed and expressed, and without further explanation we must understand it to have been fully formed and gravely expressed. The subsequent explanation is not inconsistent with this understanding. It shows only that the jurymen challenged believed that this opinion, however fixed it might have been when declared, was not then so fixed as to prevent them from finding a verdict according to evidence. This belief did not remove the exception. From a decided opinion declared, the law infers a bias, and the belief of the person so biased that he can rise superior to its influence does not repel the legal inference. Nor ought it; for it does not unfrequently happen that those who are most confident in the ability of their understanding to triumph over this obstacle in the way of its free exercise, and of the ascertainment of truth, owe this confidence to their ignorance of the stubbornness of prejudice, and may be the least qualified for the discharge of this, to all persons and at all times, perilous undertaking. The distinction which we make is substantially the same with that taken in the *Commonwealth v. Ostrander*, lately determined in the general court of Virginia, a case which has been referred to by the counsel on both sides. It was there held that he who has formed and expressed a decided opinion as to the guilt of the prisoner is an incompetent juror, but he who has formed a hypothetical opinion only, if he can decide upon the evi-

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dence without being influenced by this impression, is an indifferent juror."

On the trial of Aaron Burr for treason, Marshall, C. J., observed: "Can it be said, however, that any man is an impartial jurymen who has declared the prisoner to be guilty and to have deserved punishment? If it be said that he has made up his opinion, but has not heard the testimony, such an excuse only makes the case worse, for, if the man has decided upon insufficient testimony, it manifests a bias that completely disqualifies him from the functions of a jurymen." In the *People v. Mather*, 4 Wend. 241, Marcy, J., delivering the opinion of the court, said: "We are asked in this case to distinguish between an opinion formed by being an eye witness of a transaction or by hearing the testimony of those who were such witnesses, and an opinion founded on rumors, reports and newspaper publications, and to say the former shall be evidence of partiality and the latter not. If any distinction is to be recognized, I should be inclined to adopt the reverse of that contended for at bar. * * Of those who entertain an opinion of the guilt of the accused before his trial, they that believe on the slightest evidence, or no evidence at all, manifest, in my judgment, a state of mind less prepared to receive and allow a fair defense, than those who believe on proof which furnishes *prima facie* evidence of guilt."

A positive opinion of guilt or innocence, until 1835, in this State by statute, and in many of the States in the absence of any statute, rendered a juror incompetent who had formed or expressed an opinion, whether that opinion was based on rumor or not, and so it does now in Missouri, as we have seen, unless it appear to the court that the opinion based upon rumor is not such as to bias or prejudice the juror's mind. With a jury of twelve men, who have formed an opinion that the accused is guilty, which it will require evidence to change, of what avail is it to him that it is a principle of law as old as our criminal jurispru-

dence, held sacred by American citizens, and over and over again declared by the courts, that the law presumes him innocent. It is a cruel mockery to announce such a principle and then call a jury to try him composed of men in such a state of mind toward him as requires that he should establish his innocence. "The prisoner must not have the burden of changing the juror's mind." Grier, J., *U. S. v. Hanway*, 2 Wall. Jr. 148.

If a juror, upon mere rumor, without believing any facts, has formed an opinion which will remain until changed by evidence, he is less fit for a juror than one who has an opinion based upon facts which he has learned and believes from rumor, although it would require evidence to remove the impression from his mind. The former is prejudiced, while the latter is biased; the latter biased by an opinion based upon facts believed; the former so prejudiced that he has formed an opinion without knowing or believing any facts. Infinitely safer would an innocent man be in the hands of the juror thus biased than of the juror so prejudiced. The prejudice which leads to the adoption of an opinion of guilt without evidence, would prompt to a verdict of guilty against evidence.

In Burr's trial, Marshall, C. J., remarked: "Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence and be governed by it; but the law will not trust him. Is there less reason to suspect him who has prejudged the case, and has deliberately formed and delivered an opinion upon it? Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms than to that which would change his opinion; it is not to be expected that he will weigh

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evidence or argument as fairly as a man whose judgment is not made up in the case. It is for this reason that a juror who has once rendered a verdict in a case, or who has been sworn on a jury which has been divided, cannot again be sworn in the same case. He is not suspected of personal prejudices, but he has formed and delivered an opinion and is, therefore, deemed unfit to be a juror in the cause."

The case of *Rice v. The State*, 7 Ind. 336, relied upon by the State, is not an authority for the doctrine contended for by the attorney general, but is similar to the case of the *State v. Baldwin*, *supra*. The opinion of the juror was a hypothetical opinion, and such as is nowhere held to disqualify. *The People v. Stout*, 4 Parker Crim. Rep. 110, so far from sustaining the doctrine for which it is cited, is a direct authority to the contrary. It cites *Cancemi v. The People*, approves the ruling in that case, and distinguishes it from the *People v. Stout*.

In *Cancemi v. The People*, 16 N. Y. 501, a juror stated that he had formed an opinion and expressed it, but on cross-examination, that he had no fixed opinion, none which could not be removed by evidence. Of his statement on cross-examination, Strong, J., observed: "It may, on the other hand, be interpreted to import merely that the opinion which he had formed and expressed was not so fixed that it might not be controlled by evidence; regarding the latter branch of the expression as explaining and defining what the juror intended by saying he had no fixed opinion. In this view the ordinary force of his testimony that he had formed and expressed an opinion in the case would not be impaired. This testimony should be construed with liberality to the defendant, in the humane spirit which prevails over criminal laws and the rules of their administration. The right secured by law to a fair and impartial jury with minds open to receive and weigh the evidence and balanced in regard to the matters to be tried, is of the highest importance, and should be carefully guarded by the courts, especially in cases involving

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human life. In our opinion the latter interpretation above stated should prevail, and upon that construction the juror was clearly disqualified. His mind was preoccupied with an opinion upon the issues to be tried, which it would require evidence to remove; and that, upon principle and by all the cases, incapacitated him for a juror." See also *People v. Mallon*, 3 Lansing 232; *O'Brien v. People*, 48 Barb. 278; *Gray v. People*, 26 Ill. 346; *State v. Brown*, 15 Kas. 400; *Alfred, a slave, v. The State*, 37 Miss. 315. The constitutional provision in Mississippi was, as in this State, "that the accused in all prosecutions by indictment or information has a right to a speedy and public trial by an impartial jury." In the above case, (*Alfred v. State*), the juror said on his *voir dire* that he had heard rumors which had made such an impression or fixed opinion that it would require testimony of a character different from the rumors he had heard to remove such impression. The court of appeals, (Harris, J.,) observed: "It is well settled that an opinion formed from rumor so fixed as to require testimony to remove it, constitutes such bias as to render the juror not impartial, and consequently, under our constitution, to disqualify him for service," citing 9 S. & M. 118; 10 S. & M. 30; 13 S. & M. 189; 13 S. & M. 500; 31 Miss. 509; 32 Miss. 398; 33 Miss. 383.

In the *People v. Gehr*, 8 Cal. 359, the juror admitted that at the time of his examination he believed the prisoner guilty, and that it would require proof to change his opinion. Terry, J., delivering the opinion of the court, said: "The principle of law, founded on humanity and justice, presumes the accused to be innocent, and he is not put upon his defense until his guilt is *prima facie* established by the evidence; in the mind of the juror this principle was reversed, and the accused was already held to be guilty, even before a single witness had testified against him. The fact that the juror further said that he could try the cause impartially was entitled to no consideration." *Curry v. The State*, 4 Neb. 545.

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The recent New York decisions, which apparently conflict with the cases above cited, were rendered under a statute passed in 1872. See *Thomas v. The People*, 67 N. Y. 221.

There is no force in the argument, if it can be called an argument, that it is difficult to procure jurors who have not formed opinions when telegraphs and railroads furnish information of events to thousands in a day or an hour after they transpire, which, before their introduction, was obtained by but few, and a long time after their occurrence. I do not believe it true, in fact, that there are greater difficulties now, than before those agencies were introduced, in procuring men who, although they have formed hypothetical opinions upon rumored facts, are qualified to sit on a jury and impartially render a verdict according to the law and the evidence. Men who are fit for jurors in a criminal cause will not, upon mere rumor, form an opinion of guilt which it will require evidence to change. But, if the difficulties were as great as supposed, I am not prepared to say that section 22, article 2 of the constitution of this State is practically incompatible with the existence of telegraphs and railroads, and therefore of no force or validity, nor do I believe that electricity and steam engines have eliminated from our criminal jurisprudence the legal presumption that persons accused of crime are innocent until proven guilty. The frequency of crime may sometimes incline one to the belief that the humane principles of our law, so often invoked by accused persons, are obstructions to the punishment of the guilty which might be removed; but, when we reflect dispassionately on the subject, we are forced to the conclusion that there is wisdom, as well as humanity, in the maxim that it is better that "ninety and nine guilty men escape than that one innocent man should suffer."

The doctrine contended for by the State would nullify the constitutional provisions securing to the accused "a speedy public trial by an impartial jury," and virtually strike from the criminal law those humane principles

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which, although they may often screen the guilty, have as often saved the innocent from punishment and infamy. No other method could be devised which would so soon bring the trial by jury into utter contempt as that of composing juries of men who have such decided opinions of the guilt or innocence of the accused that it will require evidence to remove the impression from their minds. I think that the judgment should be reversed and the cause remanded, and for the same reasons favored a rehearing in the *State v. Core*. HOUGH, J., concurs.

SPEED V. THE ATLANTIC & PACIFIC RAILROAD COMPANY, *Appellant*.

1. **Master and Servant:** INDEPENDENT CONTRACTOR. The defendant, a railroad company, made a contract with one M., by which he was to take entire charge and control of defendant's freight business at the St. Louis station, loading and unloading cars, switching them back and forth in the yard, making up freight trains, and doing all other yard service necessary in the transaction of defendant's freight business. He was also, when requested, to haul freight from the levee for defendant; to prepare, execute and receive all necessary freight bills; to keep all necessary books of account, collect freight money and generally act as, and discharge all the duties of a station agent. To enable him properly to discharge his duties he was to have control over the grounds, yards and buildings, engines and cars of defendant at the station. Defendant was to furnish the necessary engines, and keep them in repair, and supplied with fuel, &c., and to employ the engineers and firemen, who were to be under M.'s control, and were to be paid by him. For his services M. was to be paid monthly at the rate of fifteen cents for each ton of freight received or delivered, and fifty cents for each car hauled from the levee. The contract was to continue for five years. The business was to be done under the control of defendant's superintendent and to his satisfaction, and if not so done, defendant could revoke the contract on twenty-four hours notice. M. performed no service for any other person than defendant. In an action to recover damages for injuries alleged to have been occasioned through the negligence of train-men in the employ of M.; *Held*, that M. was not an inde-

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pendent contractor, but stood in the relation of servant to the defendant.

2. **Negligence:** EVIDENCE: FAILURE OF RAILROAD TO RING OR WHISTLE. The signal adopted and habitually used at a certain elevator to notify the laborers engaged in loading and unloading railroad cars, of the incoming of a train, was a cry by one of the employees of the elevator company: "The cars are coming." The evidence showed that this was a safer signal at that place than the ringing of a bell or sounding of a whistle would have been. In an action brought against the railroad company by a laborer who had been at work at the elevator for some weeks and knew the accustomed signal, to recover damages for an alleged negligent wounding by an incoming train; *Held*, that the failure to ring or whistle was not negligence.
3. ———: ———. But the fact that the accustomed signal was given by the servant of the elevator company would not exempt the railroad company from liability if its servants were guilty of negligence occasioning plaintiff's injury.

Appeal from St. Louis Court of Appeals.

REVERSED.

C. M. Napton for appellant, argued, *inter alia*, that the relation of master and servant did not exist between the railroad company and Merry, citing *Stevens v. Armstrong*, 6 N. Y. 435; *Wood v. Cobb*, 13 Allen (Mass.) 58; *Hill v. Morey*, 26 Vt. 178; *Vanderpool v. Husson*, 28 Barb. 196; *Cincinnati v. Stone*, 5 Ohio St. 38; *Samyn v. McClosky*, 2 Ohio St. 536; *Wood on Master & Servant*, p. 537, § 281, and note; *Ib.*, p. 508, §§ 304, 306; *Ib.*, p. 585, § 306; *Ib.*, p. 630, § 217; *Ib.*, pp. 619, 620, 626, 629; *Eaton v. European R. R. Co.*, 59 Me. 520; *Lucey v. Ingram*, 6 M. & W. 302; *Bowcher v. Noidstrom*, 1 Taunt. 568; *Nicholson v. Mounsey*, 15 East 384; *Charles v. Tayler*, 7 C. L. J. 451; *Laugher v. Pointer*, 5 B. & C. 547.

Dryden & Dryden for respondent, as to the existence of the relation of master and servant, cited *Cincinnati v. Stone*, 5 Ohio St. 38; *St. Paul v. Seitz*, 3 Minn. 297; *Schwartz v. Gilmore*, 45 Ill. 455; *Morgan v. Bowman*, 22 Mo. 538; *Shear. & Redf. on Neg.*, (3 Ed.) §§ 73, 76, 77, 78, 79, 81, 81a, 74; *Pack v. Mayor of New York*, 8 N. Y. 222; *Kelly*

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v. Mayor of New York, 11 N. Y. 435; *Barry v. St. Louis*, 17 Mo. 121; *Robinson v. Webb*, 11 Bush 465; *Schular v. Hudson River Ry. Co.*, 38 Barb. 653; *Allen v. Willard*, 57 Pa. St. 382; *Shear. & Redf. on Neg.*, (3 El.) § 74; *Brackett v. Lubke*, 4 Allen 139; *Quarman v. Burnett*, 6 Mee. & W. 497; *Laugher v. Pointer*, 5 B. & C. 549; *The Halley*, 37 L. J. (Adm.) 36; *Kelly v. Mayor*, 1 Kern. 436; *Cuff v. New York Ry. Co.*, 9 Am. Law Reg. (N. S.) 541; *Hobbit v. London & Northwestern Ry. Co.*, 4 Exch. 253; *Hornor v. Nicholson*, 56 Mo. 220; *Dalyell v. Tyrer*, El., Bl. & El. 899; *Crockett v. Calvert*, 8 Ind. 127; *Callahan v. R. R. Co.*, 23 Iowa 564; *Annett v. Foster*, 1 Daly 592; *Abbott on Shipping*, (8 London Ed.) 228; *Sadler v. Henlock*, 4 El. & Bl. 570; *Fenton v. Dublin Packet Co.*, 8 Ad. & El. 835.

HENRY, J.—This was an action by plaintiff to recover damages for personal injuries received by him at the Central Elevator in St. Louis, while engaged in unloading and removing cars of defendant.

It appears that while so engaged, an engine, with loaded grain cars attached, belonging to the defendant, in backing down from the defendant's main track, on a side track which ran into and through the Central Elevator, were impelled against some loaded cars standing on said side track, and these were driven against some empty cars that plaintiff was pushing on said side track, out of the way, after they had been unloaded, and the plaintiff was caught between the bumpers of the two sets of cars, and was badly injured; and, in his petition, alleged that this injury was occasioned by the negligence and carelessness of defendant's employees in managing said first above-mentioned moving train. Plaintiff recovered a judgment in the circuit court, which was affirmed *pro forma* by the court of appeals, and defendant has appealed from the judgment.

The plaintiff was not in the service of defendant, but was employed by the elevator company. When the acci-

1. MASTER AND SERVANT: independent contractor.

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dent occurred, there was in force an agreement between the defendant and Charles H. Merry, providing that Merry should take the entire charge and control of the business of loading and unloading freight to and from the cars of defendant at the St. Louis station, and do the necessary switching of freight cars in the yard of defendant, including the making up of all freight trains, and all other yard service necessary in the transaction of the freight business of said company; that he should receive and promptly load all freight, etc., and, without unnecessary delay, unload from the cars all freight into the yards of defendant for that purpose, except live stock and other property of defendant, and safely keep and preserve the same until called for by the consignees; that, when specially requested by defendant, he would unload live stock and freight belonging to defendant, haul all cars loaded with fuel and other property owned by defendant from the levee to said station, and from the station to the levee, when required, and deliver same on such side track at the levee, or in the yard aforesaid, as should be designated by the company, for which he was to be paid fifty cents for each car so hauled, but not to be liable for the value of or charges on same, unless lost or injured through his fault; that said Merry should prepare and execute way bills for all freights leaving said station, and receive all way bills of freight arriving at the same from other stations, should keep all necessary books and accurate accounts of freight shipped and received as aforesaid, make out the expense bills, collect all money due for freight, and pay it over daily, in such manner and to such person as defendant should designate, and act and discharge all the duties of station agent of defendant at the St. Louis station.

By said agreement, all necessary authority and control over the grounds, yards and buildings at said station, including engines and cars, was given to Merry, to enable him properly to discharge his duties under the agreement. Also, defendant was to furnish him three yard and switch

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engines, if necessary, and keep them in good repair; to employ engineers and firemen sufficient properly to attend said engines, and to furnish all necessary fuel and water for said engines; said engineers and firemen to be under the control of Merry, while on duty in the yards, and to be paid by him for their services. It was also stipulated that defendant should pay to Merry fifteen cents per ton for each ton of two thousand pounds of freight shipped to or from said station; and all payments for services of Merry to be made on or before the tenth day of each month, for the services of the preceding month. The agreement to continue in force for five years from its date, unless sooner annulled, it being expressly agreed that *all business to be transacted by said Merry was to be done in a manner satisfactory to the superintendent of defendant, and subject to his control, and defendant to have the right to annul this contract at any time after giving twenty-four hours' notice of its intention to do so, if the business imposed on said Merry should not be transacted in a manner satisfactory to said superintendent.*

Defendant insists that, under this agreement, Merry, and not the defendant, is liable to plaintiff for any injury sustained by him in consequence of any negligence in managing and operating the train which caused the accident; that the employees managing that train were not in the service of defendant, but were the servants of Merry, who exercised an independent employment. There is an irreconcilable conflict in the adjudications on this subject. The general principle is recognized everywhere that one is only liable for damages occasioned by the act of another when he stands in the relation of master to that other. It is an easy matter to state the general principle, but it is often extremely difficult to determine, from the facts in a given case, whether the relation of master and servant exists.

The case at bar is one which, to some extent, presents that difficulty. By the contract between Merry and the railroad company, the whole duty of receiving and for-

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warding freight over the company's road from St. Louis is imposed upon Merry; but these duties are just such duties as the station agent at that station would perform, or superintend others in the performance of, if no such special agreement had been made; and, by the terms of that contract, Merry was "to act and discharge all the duties of station agent of defendant at the St. Louis station." Other duties were imposed upon Merry by this contract, which would not, perhaps, appertain to his employment as station agent, and the stipulations in the contract in regard to such other duties, and the provisions with respect to the supply of firemen and engineers by the company, and the payment of Merry and such servants for their services, produce complications rendering it somewhat difficult to ascertain the precise relation in which Merry stood to the company.

The relation of master and servant does not cease "so long as the master reserves any control or right of control over the method and manner of doing the work, or the agencies by which it is to be effected." Wood on Master and Servant, § 281; *City of Cincinnati v. Stone*, 5 Ohio St. 41; *Schwartz v. Gilmore*, 45 Ill. 457. "In order to be held chargeable for the act of another, the person sought to be charged must at least have the right to direct such person's conduct, and to prescribe the mode and manner of doing the work." Wood on Master and Servant, *supra*. "The right of selection lies at the foundation of the responsibility of the master or principal for the acts of his servant." *Kelly v. The Mayor*, 1 Kern. 436. Many other tests are given, but no one can be relied upon as infallible. One test—Shearman & Redfield on Negligence, sec. 76, say the true test—is to ascertain whether the service is rendered in the course of an independent occupation, in which the servant represents the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. Another test given by Shearman and Redfield in their work, section 77, is the fact that the alleged servant never serves more than one person. This, they

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say, furnishes a strong but not conclusive presumption that he has no independent occupation. Some cases rest upon the principle that, "where persons are invested by law with authority to execute a work involving, ordinarily, the exercise of the right of eminent domain, and always affecting rights of third persons, they are to be liable for the faithful execution of the power, and cannot escape responsibility by delegating to others the power intrusted to themselves." And one may "be a contractor as to a part of his service, and a servant as to part." Shearman and Redfield, § 77.

Applying these tests to the facts of this case, we have come to the conclusion that the relation of master and servant did exist betwixt Merry and the defendant. In the first place, all business transacted by Merry under the contract was to be performed under the supervision of the company's superintendent, who had express authority to direct the manner in which it should be done. The engineers and firemen were selected by the company, which could at any time remove them and substitute others. Merry was not in the service of any other person or company, and, by all of the above tests, he was the servant of the company, and not exercising an independent employment.

Besides, he was transacting a part of the business of the company, a common carrier, not as a lessee of the road and rolling stock, or either, but simply in loading and unloading freight which the company transported as a common carrier. As a common carrier, the law imposes certain obligations and liabilities upon the defendant, of which it is extremely doubtful whether it can relieve itself while it continues to be a common carrier, by any agreement with a third person. The doctrine might well apply that, where the law imposes a liability upon a company, in which it vests a franchise with exclusive privileges, it cannot escape responsibility by delegating to others the power to transact a portion of the business in which it is engaged, if the bus-

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iness to be transacted by the employee be but a part of the general business in which the company is engaged.

If the company should lease the entire road, or an entire portion of the road, to another company, it would cease to be liable as a common carrier, as to the whole or such portion; but it cannot parcel out its business to agents, and be a common carrier, without the liabilities of a common carrier. *Annett v. Foster*, 1 Daly N. Y. C. P. 502, was a case similar to this. The owner of a vessel and the master entered into a contract, by which the master was to make contracts for and receive freight, pay wharfage and all other expenses, and be permitted to select the kind of employment for the vessel, and receive a share of the vessel's earnings in lieu of other compensation. It was held that this contract did not relieve the owner from responsibility for damages occasioned by the negligent management of the vessel. Upon this, and the preceding authorities, we think it clear enough that the defendant would be liable to plaintiff in this case if he proved that the damage he sustained was occasioned by the carelessness of the servants managing the train in question.

The evidence proved that the employees of the elevator company, engaged in loading and unloading freight at the elevator, when cars were coming into the elevator, relied upon a signal of warning given by one in the employment of that company, by calling out "The cars are coming;" that ringing the bell would have given no warning, for the reason that every half minute in the day engines passed near the elevator ringing bells. The signal adopted, therefore, would be the one which the employees would listen for and heed. A whistle might have startled them, because unusual at that place, but would have no more apprised them that a train was coming into the elevator than would the firing of a gun or a cannon. The signal adopted was adopted as the best means of warning the employees of the approach of a train. The plaintiff had worked for the elevator com-

2. NEGLIGENCE: evidence: failure of railroad to ring or whistle.

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pany for some weeks when injured, and knew what signal was agreed and relied upon, and we repeat that it must be obvious that no other signal improvised for this single occasion, with no notice of its adoption to the employees, who would of course listen for the only warning ever given, would have answered the purpose. As well require the firing of a gun or a cannon, as the ringing of the bell or blowing of the whistle, under the circumstances. The statute requires no bell to be rung or whistle blown at that place.

Defendant's seventh instruction should have been given. It was as follows: "The court instructs the jury that if they believe it had been, ever since the elevator had been used, and was at the time of the accident, the custom not to ring the bell or sound the whistle, and not to give any other signal or warning of the intended movement of the cars, except a verbal notification given by the employees of the Central Elevator Company of the fact, and that the custom was known to the plaintiff, and with this knowledge he continued performing his work without objection, then the jury, in determining whether defendant's servants were guilty of negligence, will not consider whether the bell or whistle was sounded on this occasion, as the plaintiff cannot complain of the failure to ring the bell or sound the whistle."

Other instructions asked by defendant, to the effect that, if the customary signal was given, plaintiff could not recover, were properly refused. If the defendant's employees, in managing the train, were guilty of negligence, which was the proximate cause of the injury, and the injury would probably not have occurred if the train had carefully and properly approached the cars with which it collided, although the usual warning may have been given, the defendant was liable. If the usual warning was given and heard, but unheeded by the plaintiff, it would make a case of contributory negligence against him, but we apprehend that the fact that another person per-

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formed the duty incumbent upon him, will not excuse the defendant's negligence, if it was the proximate cause of the injury. If the warning was given but not heard, and no fault was imputable to plaintiff for not hearing it, the fact that the signal was given does not exempt the defendant from liability for the consequences of its own negligence, or carelessness, or recklessness, which occasioned the damage, if such negligence, carelessness or recklessness was established.

Judgment of the court of appeals and circuit court reversed and cause remanded. All concur.

THE STATE V. EDWARDS, *Appellant*.

1. **Murder:** INSTRUCTION. The jury was instructed that although they "might believe from the evidence that defendant, *at the time he shot into the crowd of people mentioned by the witnesses*, did not intend to kill or murder any particular person, yet if they found from the testimony that defendant, at, &c., on, &c., did purposely and intentionally shoot into said crowd of people, with a certain revolver, loaded * * * and that the breast of W. McK. was penetrated and wounded by the ball, &c., in consequence of which W. McK. died," they should convict. *Held*, that the instruction could not fairly be construed to assume, as a fact, that defendant shot into the crowd. *Held*, also, that if it could be so construed it would not be objectionable, as the fact was not controverted at the trial.
2. **Intentional Homicide:** SHOOTING INTO A CROWD: PRESUMPTION OF MALICE. If one purposely and intentionally shoots into a crowd of people without intending to kill any particular person, but does kill one of the crowd, the law will presume that the killing was intentionally and maliciously done, and the perpetrator will be guilty of murder in the second degree.
3. **Murder:** DRUNKENNESS AS BEARING ON THE QUESTION OF INTENT. The fact that the defendant in a murder case was drunk when he committed the homicide, is not to be considered by the jury in determining the question of intent. HENRY, J., dissenting.
4. **Instructions in case of Homicide.** Upon a trial for homicide it is the duty of the court to instruct only as to such grades of homicide as the evidence would apply to. If the evidence shows that

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the defendant, if guilty at all, is guilty of something else beside manslaughter, the court should not instruct as to that offense.

Appeal from Linn Circuit Court.—HON. G. D. BURGESS,
Judge.

AFFIRMED.

A. W. Mullins and Geo. W. Easley for appellant.

J. L. Smith, Attorney-General, for the State.

NORTON, J.—The defendant was indicted, in the circuit court of Linn county, for murder in the second degree, for killing William McKinley on the 4th day of July, 1878. On the trial of the same at the June term, 1879, of said court, he was convicted of murder in the second degree, and his punishment assessed to ten years' imprisonment in the penitentiary. Motion for new trial having been overruled, defendant brings the case before us on appeal. A reversal of the judgment is sought, because of alleged errors committed by the trial court in giving and refusing instructions; and, before considering the objections urged, we deem it proper to insert the evidence given on the trial in order to a proper determination of them.

On the part of the State, witness Macklin testified that he had for several years last past been a resident of the town of Laclede, Linn county, State of Missouri; that he was acquainted with the defendant, James C. Edwards; that, on the 4th day of July, 1878, about sunset, witness was in the public park in said town, near the music stand, and noticed defendant lying on the ground a short distance from said music stand. In a few minutes afterward witness saw defendant rise to his feet. Anderson Thomas and Al. Hall (a colored man) were trying to get him up. When defendant got on his feet, they gave back from him, and defendant remarked: "By God, I will see who is doing this." He drew a revolver, and holding it in both hands, tried to cock it, but at the first attempt his thumb slipped.

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In the meantime the crowd were falling back from both sides in front of defendant. Defendant made another attempt, drew back the hammer of his revolver, and shot right into the crowd northwest of him. I cannot give the number of persons in the crowd. They were tolerably thick, passing to and fro. Defendant was standing up and leaning forward when he shot. As soon as he fired his revolver, he started forward to the boy, William McKinley, who was shot, kneeled by him and commenced fanning him with his hat. I saw the ball hole in the boy's breast. He only breathed two or three times, and then died. This occurred in Linn county, and State of Missouri.

On cross-examination, witness testified that the boy was thirty or forty feet from Edwards at the time he shot, and witness supposed there were a dozen other boys nearer the defendant and in the same general direction at the time he shot. Defendant was standing, probably, as much as two minutes before he shot; was facing toward the northwest, and the pistol was discharged in the same general direction. He held the pistol across his left hand, holding it in his right hand at the time he discharged it. McKinley had not been about Edwards, to my knowledge. When I came from my supper and went into the park, I saw defendant lying on the ground; do not know how long he had been lying there. The colored boy, Al. Hall, was standing three or four steps in a northwest direction from defendant when he fired. The boy who was killed was about thirteen years old, and small of his age. When defendant was fanning the boy, he lamented what he had done. The colored boy, Al. Hall, stepped back three or four steps when Edwards got up. When Edwards got out his pistol, Al. Hall ran in a northwest direction to the corner of the lemonade stand. About the time Hall got to the corner of the stand the pistol was fired. The corner of the lemonade stand is about eighteen feet from where Edwards discharged his pistol. The place where the boy fell is about twenty-nine feet from where Edwards dis-

charged his pistol. The corner of the lemonade stand was about one foot and a half west of a line from where Edwards was standing to the place where the boy fell.

A. H. Love testified that he was marshal of the town of Laclede on the 4th day of July, 1878. As I passed Dr. Standley's office on the evening of said day, Dr. Standley informed me that defendant was lying down in the park drunk, and that he needed looking after. I crossed the street and passed through the gate into the park, and had gone about twenty feet when I saw the crowd scatter, some going east, some north and some west from where defendant was lying. Defendant got up, made two or three steps in a northwest direction, pulled out his revolver and fired it off. He seemed to have hold of the revolver with both hands. He fired in a northwest direction, where the crowd appeared to be most dense. After Edwards fired, he ran as fast as he could in the direction in which he fired. I followed, and when I came up to him he was kneeling by the side of William McKinley and fanning him with a hat or cap. Willie appeared to be dying. I let Edwards alone until the boy was dead. I then took defendant by the arm and told him to give me his revolver, which he did. I then took him before G. W. Freeman, a justice of the peace. That night I took him to Linneus, in company with Peter Chappell and Peter F. Felt. On the way to Linneus, defendant stated that the killing of the boy was an accident, and that it would not have happened had the boys not bothered him. He said he was not in the habit of carrying a revolver; that he had gone home and got this revolver because of a fuss he had had with Mr. Dysart; that, when he fired, he had intended to shoot Al. Hall, but that he did not intend to kill Hall.

On cross-examination, witness testified that Willie McKinley was twenty to twenty-five feet from Edwards at the time he shot, and that Al. Hall was six or eight feet from Edwards, in a northwest direction. The shooting occurred between seven and eight o'clock on the evening of

July 4th, 1878. On the way to Linneus, Edwards stated that he shot at Al. Hall, but said he did not intend to kill him, or hit him, I cannot say which.

Al. Hall testified that he was in the park on the evening of July 4th, 1878; that Thornburgh told him to go and get defendant up, and take him down to the stable. I went and took hold of Edwards, but could not wake him. Then Mr. Thomas came up and tried to wake him, and witness did nothing more to him. Bennie Edwards, who is a nephew of defendant, and about five or six years old, then came up and said: "Grand-pa says pour cold water on him, and that will wake him." When he said this, defendant jumped up and said: "By God, I am going to see who is doing this," or something of that kind. Defendant then jerked a revolver from his pocket. I then jumped to one side, but got a little way, when I saw him straighten out his hand and shoot. Defendant went in the direction he shot until he came to where the boy was lying. When the defendant got there, he said he did not do that on purpose; that he did it accidentally; that accidents will happen. The boy shot was Willie McKinley. The last I saw of Edwards he was fanning the boy with a hat or cap. When Edwards fired the shot, I was a little to one side of him. There were nine or ten little boys standing in the direction in which Edwards shot.

Peter F. Felt testified that he did not see the shooting, but saw the defendant a short time thereafter. Was one of the parties that accompanied Edwards to Linneus that evening. On our way to Linneus defendant said he regretted that he had shot McKinley; said that he got the revolver on account of a fuss with Dysart. He seemed very sorry and said that the killing was an accident. He said he aimed to shoot Al. Hall, but afterward said he was just in fun and aimed to shoot down in the ground.

E. M. Tracy testified that he was in the park at the time the boy was shot; that there was quite a crowd of people in the park, several hundred; saw the boy fall, and

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heard him say he was hurt, just as he fell; did not see defendant shoot. There did not appear to be much of a crowd in the direction of the shooting. The main portion of the crowd appeared to be south.

Oscar Mitchell testified that he was in the park at Laclede on the 4th day of July, 1878. He (defendant) was lying on the ground apparently asleep. I saw defendant get up, fire his revolver, and the boy fall. There were a number of children near where the boy was shot, no men that I noticed. The main crowd was west of the defendant when he shot.

Defendant offered the following evidence: A. Thomas testified that he was in the park in Laclede on the 4th day of July, 1878. When witness first saw defendant he was lying in the park and a lot of little boys were plaguing him and throwing water on him. Witness went to him and told him to get up. He got up on his feet, stepped two or three steps and fired, holding the pistol in both hands.

Thomas Murrin, a witness for defendant, testified that he was present in the park at Laclede on the 4th day of July, 1878, and saw Edwards lying on the ground in said park. Quite a number of little boys were annoying defendant when I first saw him. When he arose to his feet and fired, witness thought he was asleep, for he could notice that his eyes were shut. As soon as the pistol went off he opened his eyes, went forward to where the boy had fallen and commenced fanning him. Cross-examination: I did not see the pistol in his hands. I did not see Geo. W. Macklin. I was watching his eyes. I was standing in front of the dance stand with one foot upon the platform. I noticed that he did not open his eyes until he shot, and then he opened his eyes and ran to the boy.

W. W. Hoskins, a witness for defendant, testified as follows: I was standing about twenty feet west of defendant when he shot, and could see him plainly. He acted as if he did not know what he was doing when he fired

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the shot. He held the pistol in both hands when it was discharged. This occurred on the evening of July 4th, 1878, at the park in Laclede, Linn county, Missouri.

Defendant, James C. Edwards, in his own behalf, testified that he resided at Laclede, Linn county, Missouri; that on the night of the 3rd day of July, 1878, he had been up the greater portion of the night in charge of his father's livery stable; that on the 4th day of July, 1878, he was driving a hack all day from Laclede to the camp grounds, about half a mile west of Laclede; that the day was warm and dusty, and that he continued to drive said hack until six o'clock in the evening, when he put up his team and got his supper. Defendant further stated that he was not, nor had he been, in the habit of carrying a revolver, and that the way he happened to have one on the evening of the 4th day of July, 1878, was that two or three days previously some colored men had one of his father's buggies, and after the buggy was returned he found this revolver in it and took the same home with him. After eating my supper I took the revolver down town with the intention of giving it to the owner. After going down town I drank two or three glasses of beer, then went to the park; a short distance from the stand I lay down upon the ground and watched them dance one set; then fell asleep; and have some recollection of some one pouring water on me, some of which went into my ear. Shortly afterward some more water was poured on me, and from this time I had no recollection of anything that transpired until the revolver was discharged. There was never any ill-feeling existing between Mr. Dysart and myself, or Al. Hall and myself. Had no intention of hurting the boy, or any one else. Did not know that Al. Hall was in the park until after the revolver was discharged.

At the close of the evidence, the court gave the following instructions on behalf of the State:

1. The jury are instructed that, if they believe from the evidence, beyond a reasonable doubt, that the defend-

ant, in Linn county, on the 4th day of July, 1878, willfully, and of his malice aforethought, killed William McKinley, in the manner and by the means specified in the indictment, they will find him guilty of murder in the second degree, and assess his punishment at not less than ten years in the State penitentiary.

2. Willfully, as here used, means intentionally. Malice aforethought, as here used, means a wickedness of purpose previously formed, though it need not be formed but for a moment.

3. If the jury find the defendant guilty of murder in the second degree, they will so state in their verdict.

4. The reasonable doubt mentioned in the instructions in this case, in order to justify an acquittal on that ground, must be a substantial doubt arising from the insufficiency of the evidence and not a mere possibility that defendant is not guilty.

5. Although the jury may believe from the evidence that the defendant, at the time he shot into the crowd of people mentioned by the witnesses in their testimony, did not intend to kill or murder any particular person, yet if they find from the testimony that the defendant, at the county of Linn on the 4th day of July, 1878, did purposely and intentionally shoot into said crowd or assemblage of people, with a certain revolver loaded with gunpowder and leaden ball, and that the breast of Wm. McKinley was penetrated and wounded by the ball so discharged from said revolver, and that by reason of the wound so inflicted by said ball, the said William McKinley did then and there die, then they will find the defendant guilty of murder in the second degree.

6. The jury are instructed that if they believe from the evidence, beyond a reasonable doubt, that the defendant, at the county of Linn, on the 4th day of July, 1878, willfully, and of his malice aforethought, shot at any person or persons, other than the said Wm. McKinley, with a certain revolver loaded with gunpowder and leaden

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ball, the same being a deadly weapon likely to produce death or great bodily harm, and that by reason of said shot so discharged from said revolver, the said Wm. McKinley was then and there killed, then they will find the defendant guilty of murder in the second degree.

7. The jury are instructed that the words "malice aforethought," used in the instructions on both sides, mean a wicked purpose. These words, in the description of murder, do not imply deliberation or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but they denote purpose and design in contradistinction to accident and mischance.

8. The jury are instructed that in making up their verdict they will entirely disregard all testimony of the witnesses with reference to the defendant's drunkenness at the time of shooting off his pistol, and that drunkenness cannot be pleaded in excuse or defense of any crime.

On behalf of the defendant, the court gave the following: 6. Before the jury can find the defendant guilty of murder in the second degree, they must believe from the evidence, and that beyond a reasonable doubt: First, that the defendant killed the said William McKinley as charged in the indictment, and secondly, that he did so willfully and intending at the time to do the act, or to do violence as against some other person.

9. If, after a full and deliberate investigation and consideration of all the facts and circumstances given in evidence, the jury entertain a reasonable doubt of the defendant's guilt, then it is their duty to acquit him.

10. If the jury shall believe from the evidence before them that the defendant, at the time he discharged the pistol or revolver that caused the death of William McKinley, was not conscious of firing said shot and did not know what he was doing, then in that event the jury should find the defendant not guilty under the indictment.

Defendant's instruction numbered 7, as asked by him, is as follows: 7. The burden of proof is upon the State to

establish by evidence, to the satisfaction of the jury and beyond a reasonable doubt, every ingredient necessary to constitute the defendant's guilt; and, in determining the fact as to whether or not the defendant intended to do the act imputed to him in killing William McKinley, the jury may take into consideration all the facts and circumstances in proof, including the defendant's physical and mental condition at that time.

The court refused to give said instruction, as asked, but modified the same by striking out the words "including the defendant's physical and mental condition at that time," and then gave the same as so modified.

The following instructions asked by defendant were refused: 1. Unless the jury believe from the evidence before them, and that beyond a reasonable doubt, that the defendant, with malice aforethought, did willfully shoot at William McKinley with the intention, at the time of so shooting, to kill said McKinley, as charged in the indictment, then the jury must acquit the defendant as to the charge of murder in the second degree.

2. If the jury shall believe from the evidence that the defendant discharged his revolver without intending at the time he did so to kill William McKinley or any other person, or if the jury believe from the evidence that said McKinley was killed by defendant unintentionally or accidentally, then, in either such case, the defendant is not guilty of murder in the second degree, and the jury should acquit him thereof.

8. The court instructs the jury that, whilst drunkenness is no justification or excuse for crime, nevertheless, if they find from the evidence that the defendant was, at the time he discharged the revolver and shot William McKinley, very much stupefied, weakened and disabled by intoxication, then the jury may take this fact into consideration in determining the question as to defendant's intention and purpose at the time he discharged said revolver.

Counsel for defendant insist upon a reversal of the

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judgment because of alleged error committed by the court in giving, on behalf of the State, instructions numbered five and eight, and in refusing to give, on the part of defendant, instructions numbered two, seven and eight.

It is insisted that the fifth instruction is erroneous because it assumes the fact that defendant did shoot into a crowd of people assembled, and because it ignores the question of malice. While the instruction is open to verbal criticism, and if taken in detached portions, gives color to the objection made, yet when it is viewed altogether, the objection disappears. The fact claimed to be assumed in the instruction is "that defendant shot into a crowd of people mentioned by the witnesses." It cannot be said that the court assumed such fact, when, by the instruction, the jury are required to find from the testimony that defendant "did purposely and intentionally shoot into said crowd or assemblage of people." The instruction cannot, by any fair reading of it, be construed to assume a fact as found which the jury, by its terms, are expressly required to find from the evidence. Besides this, the fact that defendant did shoot off his revolver into the crowd assembled was not controverted, as all the witnesses who testified agreed as to this fact. The question in dispute was whether the shooting was intentionally or purposely done, and this fact the jury were required to find before they could convict.

The objection that it ignores the question of malice is not well taken. While it is true that there can be no murder in either degree without malice, express or implied, still, if the homicide was committed under the facts supposed in the instruction, the malice requisite to murder would be presumed, and the presumption that the defendant intended the probable consequences of such an act would also be indulged. A familiar illustration of this principle is afforded in the case of a workman who threw down a stone or piece of timber into the street, in a populous town, where people

1. MURDER: IN-
struction.
2. INTENTIONAL
HOMICIDE: shoot-
ing into a crowd;
presumption of
malice.

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were continually passing, and killed a person. Such a killing is murder at the common law, for the law, in such a case, presumes the intent to kill. *State v. Wieners*, 66 Mo. 22; 1 East P. C. 225, 231. It was, therefore, wholly unnecessary for the court, after telling the jury that, if they believed that defendant killed the deceased under the circumstances mentioned in the instruction, they should find him guilty of murder in the second degree, to instruct them that the law presumed that such killing was intentionally and maliciously done, for the reason that a homicide thus committed is murder of the second degree under our statute, and the jury were so directed in the instruction. It follows from what has been said that the first and second of defendant's instructions were properly refused.

The second instruction is misleading in its tendency, and, under the last clause of it, although the jury might believe that defendant shot at some other person than the deceased, and missing such person, killed the deceased, they would have been authorized to acquit. This, we think, is not the law.

It has been earnestly and with great plausibility argued by counsel that the court erred in refusing the eighth of defendant's instructions, which asked the court to tell the jury that they might take into consideration the intoxication of defendant in determining the question as to defendant's intention and purpose at the time he discharged the revolver. We have been cited to respectable authorities which maintain the correctness of the doctrine enunciated in the instruction. The authorities bearing upon the subject are conflicting, the courts of some States holding one way, and the courts of other States holding the other. It may, however, be said that the identical question presented by the instruction has heretofore been considered by this court, and it has invariably been held that intoxication or drunkenness can neither excuse nor extenuate a crime, and that it can not be taken into consideration by a jury for either

3. MURDER: drunkenness as bearing on the question of intent.

of such purposes. The question first arose in the case of the *State v. Harlow*, 21 Mo. 446, and was disposed of as above stated. It again arose in the case of the *State v. Cross*, 27 Mo. 332, where the subject was exhaustively discussed in an opinion by NAPTON, J., and the same conclusion reached. These cases were followed in the subsequent cases of *State v. Hundley*, 46 Mo. 416, and *State v. Dearing*, 65 Mo. 530. However differently the question may have been elsewhere determined, we are not disposed to overthrow the rule thus established in this State, believing it to rest upon reason and authority, and that any departure from it would neither be in the interest of a higher civilization, nor promotive of the best interests of society, nor conducive to the ends of justice.

Besides this, the instruction might well have been refused on the ground that there was no evidence on which to base it. The only evidence bearing on the question was that of witness Love, who stated "that Dr. Standley informed him that defendant was lying down in the park drunk, and that he needed looking after." This evidence was properly excluded from the consideration of the jury, in an instruction given on the part of the State, on the ground of its being hearsay, if upon no other ground.

It is also insisted that the court erred in not instructing the jury as to some of the grades of manslaughter.

When a homicide is committed, it is the duty of the court to instruct only as to such grades of the homicide as the evidence would apply to; and, as the evidence adduced in this case did not apply to any of the degrees of manslaughter, no error was committed by the court in omitting to instruct in regard thereto. Judgment affirmed, SHERWOOD, C. J., and NAPTON, J., concurring, and HENRY and HOUGH, JJ., concurring in the result.

SEPARATE OPINION BY HENRY, J.—I concur in affirming the judgment, but dissent from so much of the foregoing opinion as relates to the eighth instruction asked by defendant and refused by the court. I do not think that

4. INSTRUCTION IN
CASE OF HOMICIDE.

The State v. Edwards.

the question of drunkenness is anywhere in the case, except in the brief of counsel. There is not a particle of legitimate evidence tending to show that the defendant was intoxicated when the homicide occurred. The defendant testified that he drank two or three glasses of beer during that afternoon, but does not, nor does any other witness, state that he drank any alcoholic liquor. The instruction was, therefore, properly refused; but I do not agree that such an instruction should be refused when the evidence in a case establishes, or tends to establish, the fact that the accused was drunk when the alleged crime was committed. Such evidence is admissible, not for the purpose of excusing or extenuating a committed crime, but only to show that no crime was committed. The weight of authority and the elementary principles upon which criminal responsibility rests, favor its admission. That drunkenness may be feigned, is no reason for excluding the evidence. Insanity may be simulated—that is a matter for the jury to determine on the evidence.

In the *State v. Cross*, 27 Mo. 338, Judge Richardson, in his dissenting opinion, briefly, but clearly states the true doctrine on the subject: "Every homicide is not murder, but the quality of the offense depends upon the intent of the offender, and, therefore, the mental status at the time of the act must be ascertained before the legal character of the crime is determined. To constitute murder in the first degree, it must be committed willfully, deliberately and premeditatedly. This condition of the mind is proven when death is inflicted by poison or lying in wait for that purpose, but if neither of these circumstances attend the killing, the ingredients to constitute murder must be proved, and the ability of the accused to form a purpose, to think or deliberate, must be considered. The question is not whether there ought to be one law for a sober man and another for a drunken man, nor whether drunkenness will mitigate the criminality of the act, for if a man commits willful, deliberate and premeditated murder, he is guilty,

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drunk or sober, and deserves to suffer death, and drunkenness will not excuse or mitigate the offense, if it were done willfully, deliberately and premeditatedly. But the inquiry is whether, in fact, the crime has been committed; and, as the essence of the crime of murder is made, by law, to depend upon the condition of the criminal's mind at the time, all the circumstances ought to be heard in evidence, to enable the jury to decide whether such willful, deliberate and premeditated design existed; and drunkenness is a proper subject to be considered by the jury for whatever it is worth, in determining the state and condition of the mind." This able and clear exposition of the law is well sustained by the recent adjudications in the United States, and the argument in support of that doctrine is so conclusive as not only to justify, but to demand, its adoption, whatever may have been formerly held on the subject.

FIRST BAPTIST CHURCH, *Appellant*, v. ROBBERSON.

1. **Validity of Devises and Bequests to Churches under Constitution of 1865.** A devise of land not exceeding one acre to a church or religious society to erect a church upon, was permitted by section 13, article 1 of the constitution of 1865; but a bequest of money to such a society for the purpose of building a church or for the support of a minister was prohibited.
So, it is to the last degree doubtful whether a bequest to such a society to be used for the erection of a female seminary was not also prohibited by that section.
2. —: **PARTY TO SUIT TO ESTABLISH DEVISE.** A suit to establish a devise in favor of an incorporated religious society, should be brought in the name of the society, and not in the name of the "board of trustees" through which such societies were required by section 12, article 1 of the constitution of 1865, to manage such land as they were allowed to hold.
3. **Charitable Bequests: AMBIGUITY OF WILL: PLEADING.** Obscurity in the language used by a testator in designating the beneficiary of a charitable bequest will not defeat the bequest; and if the petition in a suit brought to establish the bequest identifies the plaintiff

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as the intended beneficiary, it will not, on demurrer, be held bad because of the uncertainty of the will in this particular.

4. **Will, Suit to Establish:** PROPER PARTIES PLAINTIFF. One who claims to be the beneficiary intended by a will may maintain a suit to construe the will.
5. **Equity:** PLEADING. A petition in a suit to obtain a construction of a will alleged, that a controversy had arisen between the plaintiff (a legatee) and the executor respecting his duties and plaintiff's rights under the will, that doubts had arisen as to its proper construction, and that danger to plaintiff's rights was apprehended unless equity interfered and gave proper directions to the executor; *Held*, that the petition was good on demurrer.
6. **Jurisdiction of Probate and Circuit Courts of Greene County, in the Construction of Wills.** The probate and common pleas court of Greene county was by law, (Local Acts 1855, p. 58, § 4,) invested with "exclusive original jurisdiction * * * to hear and determine all disputes and controversies whatsoever respecting wills, the right of executorship, administration or guardianship, or respecting the duties or accounts of executors," &c. *Held*, that the jurisdiction so conferred did not embrace the powers of a court of chancery, and, therefore, a suit to construe a will and to ascertain the rights of the devisees and legatees and the duties of the executor thereunder, was not cognizable in the probate and common pleas court, but only in the circuit court, and this whether administration was still pending in the former court or not. *HOUGH and HENRY, JJ., dissenting.*

Appeal from Greene Circuit Court.—HON. W. F. GEIGER,
Judge.

REVERSED.

The plaintiff filed a petition in the circuit court of Greene county which was substantially as follows: That plaintiff is a corporation duly incorporated and organized under the general laws of the State of Missouri; that on the 26th day of October, 1870, Harriet Bailey made and published her last will, as follows: * *

Second. I hereby bequeath the sum of \$5,000 to be expended in the erection of a church edifice in the city of Springfield, to be used and enjoyed by the Baptist society forever as a church. It is my will that said money be ex-

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pended under the direction and management of three discreet persons, to be appointed by said Baptist church. I further devise to said society, or church, one acre of land to be selected by three discreet persons, to be appointed as aforesaid, upon which said church edifice shall be erected, the said land and church edifice to remain the property of the Baptist church or society in the city of Springfield forever. I also hereby bequeath the sum of \$1,000 to said Baptist church in the city of Springfield, in trust for the following uses, to-wit: The proper officers or trustees of said church shall take charge of said sum of \$1,000 and shall keep the same at interest on good securities, and shall apply the annual interest arising therefrom to the support of the minister for the time being in charge of the church to be erected as hereinbefore provided for. * *

Sixth. It is my will, and I hereby devise and bequeath all the balance of my estate, both real and personal, to the Baptist church in the city of Springfield, upon the following conditions and for the following uses and purposes, to-wit: To be used for the erection of a seminary of learning for the use of misses and young ladies exclusively, this devise and bequest not to take effect until the said church shall raise in addition to the amount herein bequeathed and devised, to be used for the same purpose, twice the amount of this bequest or devise. My executor is hereby directed to pay over to such discreet persons, not less than three in number, as such church may appoint for the purpose, the amount of this legacy, as soon as the same can be ascertained and collected, if at that time he shall be satisfied that said church has received twice that amount from other sources, to be used in the erection of a seminary, as hereinbefore provided, in Springfield.

Seventh. In case the money to be raised by the Baptist church, in order to comply with the conditions of the legacy mentioned in the last preceding item, is not secured in good faith within one year after the amount of this legacy shall be ascertained, then it is my will that all the

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property, both real and personal, mentioned in item sixth, shall go to Dr. E. T. Robberson, &c., &c.

That on the 7th day of July, 1873, said Harriet Bailey departed this life; that on the 17th day of October, 1873, said will was duly admitted to probate before the probate and common pleas court of said Greene county, and the respondent, E. T. Robberson, the executor named in said will, duly qualified as such executor and thereafterward entered upon the discharge of his duties as such executor, and has ever since been and was at the commencement of this suit the legal and acting executor of said will; that the other defendants are legatees and devisees under said will and legal heirs of said testatrix; that the plaintiff is the Baptist church mentioned in said will; that there are conflicting claims set up to the same property under the provisions of said will, and that the rights of the plaintiff under and by force of each of the before named clauses and items of said will is the subject of controversy with the executor of said will; that appellant is in doubt as to how and by whom the acre of land devised to plaintiff in the second item of said will shall be selected; and when and by whom the amount of the devise and bequest to plaintiff in the sixth item in said will shall be ascertained and determined; and when and to whom said last named devise and bequest in said item sixth in said will shall be paid over by said executor; and when the year mentioned in the seventh item of said will will commence, within which the appellant is to secure from other sources to be used in the erection of the seminary the amount mentioned in the sixth item of said will; that said testatrix died leaving real estate of the value of \$20,000, describing it; and personal property of the value of \$40,000. And praying the advice and direction of the court as to the proper and just construction and effect of the several clauses of said will and the rights of the devisees and legatees under the same, and the duties of the executor in the performance of the trusts by force of said will.

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The defendants filed a demurrer to this petition, setting up the following grounds of objection: 1. The petition states no facts entitling plaintiff to equitable relief. 2. No facts are stated in said petition showing uncertainty or ambiguity in any of the provisions of said will under which plaintiff can claim. Nor does it appear that there is any ambiguity, doubt or uncertainty in the meaning of any of the provisions of said will requiring the aid of a court of equity to construe them. 3. It is not averred in said petition, nor does it appear that plaintiff at the date of the execution of said will had any legal existence or being. 4. If plaintiff has any interest at all under said will, she has a complete and adequate remedy at law. 5. The devisees and legatees of the said will having a complete remedy at law, this court has no jurisdiction at their suit or at the suit of any one of them to construe said will. 6. No facts are stated by plaintiff in her petition authorizing a construction of said will at her suit. 7. The said bequest of \$5,000 to erect a church edifice, named in the first clause of said will, is void. And the said bequest of \$1,000 to said Baptist church in the city of Springfield, named in second clause of said will, is likewise void. And the residuary clause of said will, devising and bequeathing the residue of testatrix's property to said Baptist church, is also void, and no suit can be maintained to construe any of said clauses. 8. There is no doubt, ambiguity or uncertainty of and concerning the said devise of one acre of land, named in the first clause in said will, requiring the aid of a court of equity. 9. Because this court has no original jurisdiction over this suit.

The demurrer was sustained and final judgment entered for the defendant. Plaintiff appealed. The case was twice argued in this court.

C. W. Thrasher and H. C. Young for appellant.

C. B. McAfee and Chas. A. Winslow for respondent.

On Rehearing.

I.

SHERWOOD, C. J.—Upon more mature reflection, I am satisfied that the view expressed by us in a former opinion, that the bequest in Harriet Bailey's will, whereby she bequeathed \$5,000 to be used in erecting a church edifice on an acre of ground also devised by the will to the Baptist church or society in the city of Springfield, was a valid bequest, was an erroneous, though plausible, view of the subject.

The 13th clause of the 1st article of the constitution of 1865 prohibits, in express terms, every gift, sale or devise of land, and every gift, sale or bequest of goods and chattels for the use, benefit or support of any minister, &c., or of any church, &c. The only exception made to the above comprehensive prohibitions is that exception which permits the gift, sale or devise of the quantity of land mentioned in the next preceding clause of the article. By that clause, one acre of ground is the limit in quantity of land which any church may hold in a town or city. With the wisdom or unwisdom of these constitutional provisions we have no concern. That was a matter confided to the framers of the constitution of 1865, and we have only to obey its behests. One thing which greatly contributed to our error on this point, on a former occasion, was our unwillingness to believe that the framers of that constitution, while permitting the donation or devise of an acre of ground to a church organization, would yet, at the same time, absolutely cut off and prohibit every gift, bequest or devise, whereby such donation or devise could be rendered of any benefit to the church or religious society to which it might have been made. But we are now fully convinced that the bequest of \$5,000 for the purposes of a church building, and the bequest of \$1,000 for the support of a minister, which last we held invalid before, must both oc-

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cupy the same position, and be held alike obnoxious to the provisions of the constitution before mentioned, thus falling within the ruling made in *Kenrick v. Cole*, 61 Mo. 572, and *Schmucker's Estate v. Reel*, 61 Mo. 592.

II.

It is altogether unnecessary to discuss the validity or invalidity of the 6th clause of the will of the testatrix relative to the establishment of a seminary for young ladies, for the reason that it is not averred in the petition, but that the amount of the bequest specified therein has been ascertained and collected, the year elapsed after such ascertainment and collection, and yet the sum required to be secured by the church within that time, in order to obtain the legacy, not so secured. It would, therefore, be useless to discuss what would be the rights of the plaintiff in the premises, when it does not appear whether the conditions have been performed, upon whose performance alone those rights must depend. The remark, however, may be ventured, that, even if the averment just mentioned had been made, showing a full compliance with the conditions specified, it is to the last degree doubtful whether the constitutional provisions before quoted would not be applicable in this instance also, thus preventing the plaintiff from taking the bequest, not for its own benefit, but for merely a charitable or educational purpose.

III.

I have no doubt as to the legal capacity of the plaintiff to maintain this action. The petition alleges the incorporation of the plaintiff, and the demurrer 2. —: party to suit to establish devise. admits the truth of such allegation. The corporate name was, therefore, the obviously proper one in which to bring suit. *North St. Louis Christian Church v. McGowan*, 62 Mo. 279. And there is nothing in clause 12 of article 1 of the constitution, *supra*, which forbids this view. The fact that, under the provisions of that clause,

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a board of trustees is to transact the financial business of the ecclesiastical corporation does not change the rules of pleading, nor the authority of well-settled precedents. The same line of reasoning which would forbid the church from suing in its corporate name would also prevent the "board of trustees" from doing the like as such board, for the obvious reason that no such power is conferred by the clause just referred to, and consequently, according to the defendant's theory, cannot exist.

IV.

Nor is it to be doubted that, under the pleadings, the plaintiff is the beneficiary under the will. This the petition alleges; this the demurrer admits. And even if the language of the bequest were somewhat obscure, such obscurity would not be suffered to defeat the purpose of the testatrix as to the one acre of ground, this being the case of a recognized charity. *Schmidt v. Hess*, 60 Mo. 591, and cases cited.

3. CHARITABLE BEQUESTS: ambiguity of will: pleading.

V.

And it was competent for the plaintiff, in this instance, to take the initiative and institute the present proceedings, though this is usually done by the executor or trustee, by a bill in the nature of a bill of interpleader; and this for his own protection. I Redfield on Wills, 492, and cases cited; Com. Dig. Chy. 3, G. 6; 1 Sto. Eq. Jur., § 544; *Stevens v. Warren*, 101 Mass. 564; *Bailey v. Briggs*, 56 N. Y. 407.

4. WILL, SUIT TO ESTABLISH: proper parties plaintiff.

VI.

So far as concerns the petition, it is substantially good, since it alleges a controversy to have arisen between the plaintiff and the executor, respecting his duties and plaintiff's rights under the will, and that doubts have arisen as to its proper construction, and that danger to those rights is apprehended, unless equity interfere and give proper directions to the executor.

5. EQUITY: pleading.

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VII.

I shall next discuss whether the circuit court had jurisdiction of the cause. Under the law of its organization, (Loc. Acts, 1855, p. 58, § 4,) the probate and common pleas court of Greene county has exclusive original jurisdiction in all cases relative to the probate of last wills and testaments, granting letters testamentary and of administration, * * and the settlement and allowance of accounts of executors, administrators, guardians and curators, and * * to hear and determine all disputes and controversies whatsoever respecting wills, the right of executorship, administration or guardianship, or respecting the duties or accounts of executors, administrators, guardians or curators, * * to hear and determine all disputes and other proceedings instituted against executors and administrators, upon any demand against the estate of their testator or intestate, etc., etc. The statute creating the probate and common pleas court of Greene county differs in no essential particular from the statutes at large respecting the jurisdiction of county courts, which statutes in relation to the probate jurisdiction of such courts have been on the statute book since 1825.

In *Miller v. Woodward*, 8 Mo. 169, where no final settlement had been made, in commenting upon similar language to that above quoted, Mr. Justice NAPTON, speaking for the court, held that such language did not oust the circuit court of its chancery jurisdiction to establish a demand against an estate, or to restrain, by injunction, the administrators of that estate from making distribution, nor preclude that court from affording to the complainant, a surety, equitable relief by substituting him in the place and stead of the creditor, as to all securities, funds, liens and equities which the latter possessed; and that such substitution could only be recognized and accomplished in a court of equity; and this upon the ground of the demand

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being purely equitable. And in *Clark v. Henry's Admr.*, 9 Mo. 340, *Miller v. Woodward*, *supra*, is mentioned with approval by the same judge who delivered the opinion in each case, and the original and ancient jurisdiction of courts of equity, so far, at least, as concerns proceedings analagous to the present one, undisturbed by statutory provisions, or modern usage in courts of law, fully and forcibly maintained. The case of *Overton v. McFarland*, 15 Mo. 312, enunciates nothing to the contrary of the cases just cited. The only point in judgment there was that the powers conferred on the county court, by the statutory provisions already quoted, were not absorbed by reason of the circuit court being possessed of a general control over executors, administrators, etc. It is scarcely necessary to say that the maintaining of the present proceeding by no means depends upon a denial of that doctrine.

The powers invoked here are not within the scope, grasp or jurisdiction of probate courts; but powers possessed alone by courts of equity—possessed independent of and long anterior to the existence of the statute mentioned—possessed for the beneficent purpose of affording relief where no adequate redress can be afforded under the ordinary course of legal procedure. Now it has been determined that probate courts in this State possess no chancery powers. *Presbyterian Church v. McElhinney*, 61 Mo. 540. But it is only in a tribunal possessing such powers that an executor or administrator can file a bill in the nature of a bill of interpleader, in order to have his duties defined and his pathway marked out by the decree of a court fully competent to adjudicate upon the complex questions which sometimes arise in the course of administration. And the reason why a court of equity is the only tribunal thus competent is because a court of law can deal alone with past occurrences, while the peculiar province and distinguishing feature of the court of equity is to administer preventive justice; to entertain measures of precautionary relief; to forestall wrongs or anticipated mis-

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chief; and in affording its comprehensive and wide-reaching relief, extend its arm *in futuro*; arrest the progress of impending evils and thwart the threatened danger. Besides, a court of equity ought to entertain jurisdiction of this cause, because capable to avoid a multiplicity of suits, which a court of law would be compelled to entertain at the instance of each dissatisfied suitor interested in the subject matter of the will. I think it may be safely affirmed that no instance can be found in the books where a court of law, a court merely of statutory origin, has been adjudged the possessor of such powers.

Doubtless the Legislature might confer such powers on probate courts, but doubtless our Legislature never has. This is shown not only by the authority just referred to, but by the case of *Schulter's Admr. v. Bockwinkle's Admr.*, 19 Mo. 647, a case which arose in St. Louis county. In that instance, it was ruled that the special statutory proceeding against an executor or administrator, under the provisions of section 36, page 148, R. S. 1845, for specific performance, could be maintained in the county court only when the contract was in writing; otherwise, the proceeding must be had "under the general law," *i. e.*, in the circuit court, which alone could enforce specific performance when the contract rested in parol. And the Legislature must evidently have been of the same opinion as to the jurisdiction of county courts, or else they would not have been at the pains to have conferred, in a single instance and in one particular way, equity powers upon such courts, if those courts already possessed a general equitable jurisdiction. So, also, in the case of *Mead v. Jennings*, 46 Mo. 91, it was held that, if the executors of a will failed to act as required by the testatrix, a complete remedy was to be had by filing a bill, not in the county court, but in equity, to compel them to execute the trust. The above are only a few of the many cases which might be cited as showing what hitherto has not been deemed doubtful, that circuit courts, or those on which such jurisdiction was expressly

conferred by the law of their organization, were the only *fora* capable to administer equitable relief.

I am aware of but two instances where the attention of this court has been called to a proceeding like the present; that is, a bill to construe a will. Those cases are *Collier's Will*, 40 Mo. 287, and *Jamison, Exr. of Bell, v. Hay et al.*, 46 Mo. 546. In the first instance, the proceeding was instituted by the trustees mentioned in the will; whether they were also executors does not appear. In the second instance, the application was by the executor as such. Distinguished counsel were, however, employed in each instance, and the matters incident to the construction of wills learnedly and exhaustively discussed; but it was not for a moment questioned that the circuit court, sitting as a court of equity, was the only *forum* competent to give instructions to those applying therefor how safely to dispose of the vast property devised and bequeathed in the first instance mentioned, and of the by no means inconsiderable estate devised and bequeathed in the second instance.

But it is suggested by counsel, that Collier's case differs from this, in that it does not appear, but that the general administration had in that case been finally closed. I am altogether unable to see how that circumstance affects in the slightest degree the point under discussion, for if the jurisdiction of the probate and common pleas court, as to all matters pertaining to the "duties or accounts of executors, &c., and as to all disputes and controversies whatsoever respecting wills," is "original and exclusive," then it must needs follow that the only jurisdiction which the circuit court could possibly exercise in such matters would be an appellate jurisdiction; and this regardless of the question, whether the administration was pending in the probate court or previously determined; for it cannot, with any show of reason, be contended that the final winding up and settlement of an estate in the probate court, would *ipso facto*—would by operation of law develop a new juris-

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diction in the circuit court, never existing before, until that hour. So that the position of defendant's counsel will be found ultimately to resolve itself into this: That you cannot invoke the equitable interposition of the circuit court, while the administration is in progress, because the jurisdiction of the probate and common pleas court is original and exclusive; nor after final settlement, for the self same reason—in a word, that in no probate matter will equity take cognizance or afford relief. I am unwilling to accept such a theory, or such, its inevitable consequences.

Granting, however, for the sake of argument, that the jurisdiction of the probate and common pleas court is as extensive as counsel claim; granting that we must stick in the bark of a literal construction, still this case does not fall within that jurisdiction, and for this obvious reason: That the duties of this executor, Robberson, are not conferred by the statute, but by the will. In the case of *Coil v. Pitman's Admr.*, 46 Mo. 51, an administrator with the will annexed, under the power conferred by that instrument, sold land, but failed to make a deed to the purchaser, and the latter applied to the county court for specific performance, which was refused. This court, after quoting the statutory provisions before noted, held that, as the specific power to sell was conferred by the will, and had no existence in consequence of statutory law, the administrator acted independently of the county court, and was not amenable to it for the performance of any duty respecting the sale; that, when the authority to sell was derived from statutory provisions, a different rule prevailed, and the administrator became subject to the control of the court, and its full "supervisory power and jurisdiction in all matters touching the premises;" but that, since the will in that instance bestowed the power, the only resort of the purchaser for specific performance was to a court of chancery; that the statute had not conferred such jurisdiction on the county court, and that nothing in favor of the jurisdiction of that court was to be taken for granted or given by im-

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plication. It is quite evident from the case just cited that only matters resting in the ordinary routine of administration were held exclusively cognizable by probate courts. Tested by the rule just announced, it will be found that, as the powers in the present instance are conferred by the will, and not by the statute, the probate and common pleas court has no jurisdiction, and the only proper resort of plaintiff was to the present method of procedure, and in the circuit court.

VIII.

If it is established that the circuit court has jurisdiction, then no more difficulty can attend the enforcing of the decree which it may render in this than in any other cause whatsoever. Jurisdiction existing, the power to enforce and effectuate whatever may be done pursuant to such jurisdiction follows as a necessary incident.

IX.

It would seem that the devise as to the acre of ground on which to build a church was sufficiently definite to obviate the necessity of asking the construction of that clause of the will, but the petition alleges and the demurrer confesses that a controversy has arisen between the plaintiff and the executor respecting that devise. For this reason alone, the judgment will be reversed and the cause remanded. All concur, except HOUGH and HENRY, JJ., who dissent.

HOUGH, J., DISSENTING.—I dissent from the opinion of the majority on the question of jurisdiction. I do not presume it will be contended by any one that the probate court is a court of chancery, or a court exercising general equity powers, and in that sense the decision in *Presbyterian Church v. McElhinney*, 61 Mo. 540, is correct; but there can be no question that, since the year 1825, probate courts in this State have been invested with, and have lawfully exercised in the settlement of estates, powers and jurisdiction

formerly exercised only by courts of chancery. The simple reading of the statute quoted in the opinion of the majority, together with the administration act, is sufficient to show this. But it has also been expressly and repeatedly so decided by this court.

In *Jackson v. Jackson*, 4 Mo. 210, a bill was filed on the chancery side of the circuit court to establish and carry into effect the provisions of a lost will. This court held that, under the act of 1825, (which is substantially the same as that now under consideration,) the probate court had exclusive original jurisdiction of the matters set forth in the bill, and that the court of chancery had no concurrent jurisdiction with the probate court. Judge Tompkins, who delivered the opinion of the court, said: "The probate court (now county court) can in this case grant as much relief as a court of chancery." In *Miller v. Woodward*, 8 Mo. 169, to which reference will be made hereafter, and in which the whole field of probate jurisdiction was critically examined, Judge NAPTON conclusively shows that the entire jurisdiction formerly exercised by the ecclesiastical and chancery courts, in the settlement of estates, was vested by statute in the probate courts. In *Miller v. Iron County*, 29 Mo. 122, Judge NAPTON, in commenting upon the nature and extent of the probate jurisdiction conferred upon the county court, said: "In this field of jurisdiction, the court is a branch of the State judiciary, exercising, in fact, a jurisdiction originally found in the chancery courts and ecclesiastical courts of England, and conferred here by statute upon these county tribunals." *Titterington v. Hooker*, 58 Mo. 593, announces precisely the same doctrine advanced in *Miller v. Woodward*, *supra*, though the latter case was not cited in argument nor referred to in the opinion. In *Pearce v. Calhoun*, 59 Mo. 271, the case of *Titterington v. Hooker* was affirmed, and Judge Wagner, who delivered the opinion of the court, used the following language: "Our probate courts were established, with extensive powers and jurisdiction, for the purpose of doing everything

necessary to the full and final administration of an estate. Both real and personal property are under their control for the payment of debts. They possess about the same powers formerly exercised in England by the ecclesiastical and chancery courts." In *Ensworth v. Curd*, 68 Mo. 282, it was expressly said that, in the settlement of a copartnership dissolved by death, the probate court exercised the powers of a court of chancery.

So that the question of jurisdiction before us is not to be determined by a reference to Redfield on Wills, or Comyn's Digest, or Story's Equity, or the decisions of other states, but to the statutes of this state conferring jurisdiction upon the probate courts and the decisions of this court made in reference thereto. Section 544 of Story's Equity, cited in the opinion of the majority, to show that an executor or administrator may go into a court of equity for the purpose of adjusting the claims of creditors, and having a final decree settling the order and payment of the assets, when he finds the affairs of his testator or intestate so much involved that he cannot safely administer the estate, does not state the law as it exists in this state. Such was the law in a system of jurisprudence under which courts of chancery could take the administration of estates out of the spiritual courts and proceed to final settlement and distribution. No one, I imagine, will contend that the circuit court, which with us is the only court of general equity jurisdiction, has a right, on any pretext, or in any contingency, to assume original jurisdiction of the administration of estates. The decisions in Massachusetts on this subject are not applicable here. In that state, equity jurisdiction in all cases of trust arising in the settlement of estates is expressly conferred by statute on the supreme court. *Hooper v. Hooper*, 9 Cush. 127, R. S., chap. 81, § 8; *Treadwell v. Cordis*, 5 Gray, 341, R. S. 1836, p. 500, § 8. For a similar reason, the decisions in New York are not authority here. In *Seymour v. Seymour*, 4 John. Chy. 409, it was

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held that courts of equity have concurrent jurisdiction with courts of probate in the settlement of estates.

In this state, whatever jurisdiction is conferred upon probate courts by the act in question, is exclusive. Such is the language of the statute. And, as the probate court has jurisdiction to hear and determine "all disputes and controversies whatsoever respecting wills, * * * or respecting the duties of executors," such jurisdiction must necessarily be exclusive while the administration is pending in such court. This jurisdiction is conferred upon the probate courts solely for the purpose of administering estates—that is, for their settlement and distribution. And, when the administration is ended, and the property of the estate has been distributed to those who are entitled to it, the jurisdiction of the probate court over the parties interested, as well as the property they have received, alike ceases. Thereafter the rights of heirs, devisees and grantees, and the duties of trustees who have received property through the administration proceedings, are subject to adjudication in the courts of general jurisdiction. And it may well be that when, pending the administration, trustees have received property clothed with a trust, controversies between them and their *cestuis que trustent* would be properly heard and determined in the circuit courts; for, as to such property, the administration would in reality be ended; as much so as if the estate had been finally settled, there being nothing further for the probate court to do in reference thereto. Such I understand to be the case of *Collier's Will*, 40 Mo. 287.

In the case of *Brant's Will*, 40 Mo. 266, which was a proceeding by a devisee against the executor, involving the construction of the will, this court said: "There was some doubt as to whether the court had jurisdiction over the matter before the close of the administration, and it is believed that it was for that reason that the petition was dismissed; but as the same subject is again pending and the parties are desirous of having the will construed, we will

waive that point and examine the questions arising in the case." In the case of *Jamison, Exr., v. Hay*, 46 Mo. 546, no question was made as to the jurisdiction of the court, and, as the record shows, all of the forty defendants, except one, appeared and submitted the construction of the will to the court. As Judge Wagner, who delivered the opinion in the case of *Brant's Will*, also delivered the opinion in this case, he doubtless did so for the same reason given in *Brant's Will*, waiving the question of jurisdiction.

As the opinion of the majority is chiefly based upon the decision in *Miller v. Woodward, supra*, and as that decision is, as I conceive, misapprehended and misconstrued, it may be well to state what that case was and what was decided. Miller, the complainant, was surety for one Manzey, on a collector's bond. Manzey died intestate and insolvent; the defendants, Woodward and Thornton, were his administrators. The state sued Miller and recovered judgment against him as surety for \$264, which judgment Miller paid, his co-sureties being insolvent. Distribution of the assets among the creditors had been ordered by the probate court. Miller filed a bill in the circuit court, stating the foregoing facts and praying that the administrators be enjoined from making distribution, and that they be required to pay to him the amount paid by him to the state. A general demurrer to the bill was sustained by the circuit court.

There was no controversy as to the jurisdiction of the circuit court over Miller's demand against the estate of Manzey, because it exceeded the sum of \$100, and the statute expressly provided that the circuit court should have concurrent jurisdiction with the county court of all suits against executors and administrators when the demand exceeded \$100. The question on which Judges NAPTON and SCOTT divided was, whether, when Miller went into the circuit court to establish his demand, he should, in the first instance, under the practice then prevailing, have taken the chancery side, or the law side of that court. Judge Scott

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was of opinion that he should first have established his claim at law.

The opinion of the court, as delivered by Judge NAPTON, was, that Miller's demand was an equitable one, and if relief were sought outside of the county court it could only be had in a court of equity, and that Miller properly sought the chancery side of the circuit court. But both judges were of opinion that the demand could have been established in the county court. Of course there could have been no difference of opinion on that point, for by the express language of the statute, the demand was within the concurrent jurisdiction of the county court and the circuit court. Judge NAPTON said: "The amount involved places the case within the concurrent jurisdiction of the county and circuit courts, and the demand being purely equitable, it falls to the chancery side of the circuit court." Judge Scott said: "The demand exceeded \$100, the county court and circuit court had concurrent jurisdiction over it, and the party might have established it in either court. It is, however, a legal demand, and if he goes into the circuit court, he must take the common law side of that court." This case, it will be seen, furnishes no support whatever to the opinion of my associates; on the contrary, it is directly in the face of that opinion.

Instead of being authority for the statement that, because Miller's demand was "purely equitable," it could only be established in a court of equity, it is an express authority that it might have been established in the county court as well as on the chancery side of the circuit court, and it necessarily follows that but for the clause of the statute giving the circuit court concurrent jurisdiction with the county court, the county court would have had exclusive jurisdiction of the demand. If Miller's demand had been less than \$100, although it was "purely equitable," the county court would have had exclusive jurisdiction. But this is not all that was decided by that case. In consequence of an erroneous decision as to the concurrent ju-

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risdiction of the probate and circuit courts made in *Erwin v. Henry*, 5 Mo. 469, Judge NAPTON, in his opinion, enters upon a most elaborate review of the whole question, and after stating that the powers exercised by the chancery courts in England and those of the United States where the English system prevailed, grew out of the same jurisdiction of the ecclesiastical courts, makes the following observation: "It is thus seen, that the principal reason given by the equity courts of England for their assumption of such extensive jurisdiction, both concurrent and exclusive, over executors and administrators, and the settlement of estates, has been for the want of an efficient and adequate remedy at law. These defects, it is also seen, in the power of the English ecclesiastical courts do not, to any extent, exist in the organization or powers of our courts of probate. It is true, that where courts of equity have once acquired jurisdiction, in consequence of the want of remedy elsewhere, the subsequent provision of a remedy by the legislative department has been held not to divest chancery of its jurisdiction, unless exclusive words are used in the act; it is better to increase the jurisdiction of courts than to limit them; for thereby a choice of tribunals is left to suitors. But this principle has no application in this case; for the legislature have used, as we have seen, exclusive words and the county courts and courts of chancery cannot be concurrent, except so far as they are made concurrent by the 7th clause of the 15th section. By that section it has been seen that the circuit courts have concurrent jurisdiction with the county courts in all suits against executors and administrators, where the demand exceeds \$100."

In *Orerton v. McFarland*, 15 Mo. 312, Judge Gamble in discussing this subject used the following language: "In *Miller v. Woodward and Thornton*, 8 Mo. 169, so much of the decision in *Erwin v. Henry*, as maintained the jurisdiction of a court of equity in the matters specified in the clauses of the section giving jurisdiction to the county

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courts was overruled. It was there held that all the clauses of the section, except the 7th, (which relates to the allowance of demands against the estate,) were exclusive, and that the general control over executors, administrators, guardians, &c., conferred upon the circuit court by the 6th clause of the 8th section of the act, was not to be understood as interfering with the grant of exclusive original jurisdiction made to the county courts. The case of *Clark and wife v. Henry, Admr.*, 9 Mo. 340, which is the same case in which the first decision was made, asserts the jurisdiction of a court of equity to determine a case of alleged waste and mismanagement of an estate after it has been finally settled in the county court, and when of course the jurisdiction of that court has been exhausted. *

* There is nothing in any decision that has been made, that will warrant the interference of a court of equity in a case like the present. Here the administration, (as must be intended from the petition,) is still in progress before the county court, and that court is competent to hear and determine the controversy respecting the duty of the administrator in relation to the property mentioned in the petition, and has exclusive original jurisdiction of such question."

Pending administration in the probate court, no court has authority to advise it how to proceed, or to interfere with its jurisdiction. Under the statute cited, it has exclusive jurisdiction to construe wills for the purposes of the administration, and to direct executors as to their duties; and, if it errs, an appeal lies to the circuit court. The power to construe wills must, in the very nature of things, be exercised by the probate court in the settlement and distribution of the estate of every testator. Numerous cases in which this power has been exercised appear in our reports. In the case of *Hamilton, Exr. of Taylor, v. Lewis*, 13 Mo. 184, the construction of a will was originally sought in the county court. In *Dyer v. Carr's Exr.*, 18 Mo. 246, the opinion of the probate court was formally taken as to

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the true construction of a will, but, as no order was made by that court to carry its construction into effect, this court said no appeal would lie from its decision. In *Overton v. Davy's Exr.*, 20 Mo. 273, the probate court construed the will of Davy and ordered distribution accordingly, and that judgment was affirmed. The opening paragraph of the opinion of this court is as follows: "The proper construction of the will of Cornelius Davy is the only point in this case for the consideration of this court." In *Rose v. McHose's Exrs.*, 26 Mo. 590, a construction of the will and an order of distribution based thereon were asked of the probate court, and its judgment was affirmed. In *Bryant v. Christian*, 58 Mo. 100, construction of will and order of distribution were asked of the probate court, and its judgment was affirmed. In *Allison's Exr. v. Chaney*, 63 Mo. 279, the will was construed and an order of distribution made accordingly, and its judgment was affirmed.

Section 49 of the chapter on Wills is as follows: "All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them." What court is so directly concerned in the execution of last wills as the probate court? And yet it is said that, although the probate court is to have due regard to the directions of the will, and although it has exclusive original jurisdiction, not only of the probate of wills, but of all disputes and controversies whatsoever respecting wills and the duties of executors, still it has no authority to construe a will.

It is unnecessary to make any observations on the case of *Schulter's Admr. v. Bockwinkle's Admr.*, 19 Mo. 647. It follows the statute, and furnishes no argument to either side on the question now before the court. The remark of Judge Wagner in *Mead v. Jennings*, 46 Mo. 91, that "if the executors should neglect or fail to act as required by the testatrix, the plaintiffs have a complete remedy in equity by filing a bill to compel them to execute the trust,"

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referred to duties imposed upon the executors as trustees, after the final settlement and distribution of the estate, as an examination of the will in that case will show. That case, therefore, has no bearing on this. Judge Wagner never intended to assert that the probate court has no power to compel the executor to make distribution according to the provisions of the will. In the case of *Coil v. Pitman's Admr.*, 46 Mo. 51, the duty of the administrator to make a conveyance arose out of his contract with the plaintiff, and not out of the will, and the circuit court was, therefore, the proper forum in which to enforce that contract; as much so as if the contract had been made by a devisee under the will.

I am of the opinion that the probate court of Greene county had exclusive original jurisdiction to determine the validity of the devises in the will of Mrs. Bailey, and to direct the executor as to his duties under said will. *Kenrick v. Cole*, 46 Mo. 85.

I am further of the opinion that neither the circuit court nor this court has any semblance of authority in a proceeding like the present to pass upon the validity of a will which has been proven in the probate court. If parties wish to contest the validity of a will which has been proven in common form, or pray to have a will proved which has been rejected, they must proceed under the 29th section of the chapter on Wills. *In re Duty's Estate*, 27 Mo. 43. The judgment of the probate court is conclusive, and it can only be annulled in a direct proceeding instituted for that purpose under the statute. *Dilworth v. Rice* 48 Mo. 124; *Banks v. Banks*, 65 Mo. 432.

The judgment of the circuit court sustaining the demurrer and dismissing the bill should, in my opinion, be affirmed.

HENRY, J., DISSENTING.—The plaintiff, a legatee and devisee under the last will and testament of Harriet Bailey, deceased, filed a petition in the circuit court of Greene

county against the other legatees, devisees and the heirs-at-law of the deceased, and the executor of her last will and testament, alleging that conflicting claims are made by different parties to the same property, and that plaintiff is in doubt as to the proper construction of the will, and as to the rights and interest of plaintiff in the property and estate devised and bequeathed to plaintiff, and concludes by asking the advice and direction of the court as to the proper construction and effect of the several clauses and items of the will under which said doubts arise. It also appears from the petition that the administration of the estate is pending in the probate court of Greene county.

By section 7 of the act in relation to courts of record, (Wag. Stat. 440,) the several county courts, and the probate court of Greene county by the act establishing it, "shall, when not otherwise provided by law, have exclusive original jurisdiction * * * to hear and determine all disputes and controversies whatsoever respecting wills, the right of executorship, administration and guardianship, and respecting the duties and accounts of executors, administrators and guardians," &c. By the same section, in the same language, exclusive original jurisdiction is conferred upon those courts, in all cases relating to the probate of wills, the granting letters testamentary and of administration, and repealing the same; appointing and displacing the guardians of orphans, minors and persons of unsound mind; in binding out apprentices; to hear and determine all suits and other proceedings instituted against executors or administrators upon any demand against the estate, when such demand shall not exceed \$100. The jurisdiction to hear and determine all controversies whatsoever respecting wills and the duties of executors and administrators is as exclusive as the jurisdiction on any other subject mentioned in the section. The petition states a case expressly within the exclusive jurisdiction conferred upon county courts by the 7th section.

The exclusive jurisdiction of the probate courts and

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county courts with probate jurisdiction is recognized in the following cases: *Graham v. O'Fallon*, 3 Mo. 507; *Jackson v. Jackson*, 4 Mo. 210; *Miller v. Woodward*, 8 Mo. 174; *Overton v. McFarland*, 15 Mo. 312. But, aside from all authority on the subject, the statute, plainly enough, not only confers authority on the probate court to construe wills, but gives it exclusive jurisdiction over all disputes and controversies respecting them and respecting the duties of executors and administrators pending the administration of the estate in that court. Here the circuit court was only asked to construe the will for plaintiff and direct the executor as to his duty under the will. Suppose the probate court should entertain a different view as to the construction of the will and the duty of the executor? It has the control of the estate, and is bound to make all necessary orders for its administration. Where does the circuit court get its authority to control or instruct the probate court in such matters? By the express, unequivocal terms of the statute, the probate court has original, exclusive jurisdiction to hear and determine all disputes and controversies whatsoever respecting wills and the duties of executors, but it is contended another court has authority to tell that court how to hear and determine those controversies and disputes. The probate court has original exclusive jurisdiction, but the circuit court has the learning, and therefore the authority, to instruct the other how to exercise that jurisdiction.

Does the petition state facts which show that a controversy has arisen with respect to the will? If so, it must be settled in the first place in the probate court. The authority claimed for the circuit court is not conferred by section 2, Wagner's Statutes, 430, giving it a superintending control over county courts and justices of the peace. Appeals lie to the circuit court for the correction of any errors which may be committed by the probate court in the exercise of the jurisdiction conferred upon it by section 7, and in this, and in no other manner, can the circuit court exer-

cise a superintending control over that court as to its judgments, orders and proceedings under that section, and the exercise of a superintending control over that court in any other manner must relate to matters not embraced in that section. If the authority claimed for the circuit court in this case exists under section 2, then it may interfere and direct justices of the peace and probate courts how to proceed in any case pending in those courts; how to construe written instruments offered in evidence; how to decide questions as to the admissibility of evidence or the competency of witnesses. Courts of law are as competent as courts of equity to construe wills. The mere construction of wills is not a ground of equity jurisdiction. In a suit in equity, that court construes a will when it becomes necessary in the progress of the trial. So does a court of law, but where or when was it ever held that, in a cause pending in a court of law, a court of equity could determine for it how a will should be construed? The supreme court, by the constitution, section 3, article 6, has "a general superintending control over all inferior courts," but an application to this court to construe a will for a circuit court, in which a cause originating under the will was pending, would certainly not be listened to with much favor.

But it is said that this is not a controversy respecting a will; that a controversy respecting a will is one in which its execution is questioned, or the competency of the testator to make it is denied, or undue influence in procuring its execution is alleged. This argument overlooks the first clause of the section (7), by which original exclusive jurisdiction is given to the county courts, in all cases relative to the probate of last wills and testaments. The other clause of the section, giving it jurisdiction to hear and determine all controversies whatsoever respecting wills, has a wider scope and embraces all disputes respecting the construction of wills.

It is further contended that the statute has made no provision for bringing into the county court the parties in-

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terested, and, therefore, the circuit court must necessarily exercise the jurisdiction herein claimed. By section 17, Wagner's Statutes, 420, all courts have power to issue all writs which may be necessary in the exercise of their respective jurisdictions, according to the principles and usages of law, and by section 8, page 440, "The said (county) court shall, when not otherwise provided by law, have power to award process, and to cause to come before them all and every person * * * who, as executors, administrators, guardians, or otherwise, shall be interested or in any way accountable for any lands, tenements, goods or chattels belonging to * * * the estate of any deceased person." These sections are a complete answer to the suggestion last noticed.

Nor has the circuit court the jurisdiction asserted under that clause of section 2, Wagner's Statutes, 430, giving it a general control over executors, administrators, guardians, curators, minors, idiots, lunatics and persons of unsound mind. This was distinctly decided in the case of *Miller v. Woodward, and Thornton's Admr.*, 8 Mo. 175. "It is apparent then, from an examination of the different provisions of our acts, that the general control over executors and administrators given by the 6th clause of the 8th section of the act concerning courts, must be limited in its application to such cases as are not provided for in the more specific distribution of equity jurisdiction, to be found both in our act concerning administration, and in the act defining the jurisdiction and the powers of the county and circuit court. The clause appears to have been inserted through abundant caution. The legislature, notwithstanding the care with which they had devised, in the law of administration, suitable modes by which estates could be settled without the aid of courts of equity, except where the intervention of such courts was expressly authorized, thought proper to invest the courts of equity with this general control over executors and administrators to be exercised where the remedy at law was still inadequate."

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The same was equally as clearly held in *Overton v. McFarland*, 15 Mo. 313.

That county court justices are not required to be learned in the law, and are not supposed to be competent to construe wills, are considerations that might be urged upon the legislature against conferring upon those courts the jurisdiction given them by the 7th section; but when the general assembly has seen proper to confer an exclusive jurisdiction upon a judicial tribunal, it is not for this court to say that the judicial officer whom the people may elect to preside there may be incompetent to discharge the duties imposed on him by the law, and, therefore, the law is to be held for naught. If the legislature should see proper to confer exclusive jurisdiction upon justices of the peace, throughout the state, to hear and determine causes involving titles to real estate, the courts might think it unwise legislation, but could not hold the act, therefore, invalid. It is not unconstitutional to assume, in a legislative act, that justices of the peace or other judicial officers, are capable of discharging any judicial function which they may be required by the act to discharge. The probate court can scarcely make an order with respect to the estate of a testator without first construing his will. In every order of distribution it necessarily construes the will.

I think that the circuit court committed no error in sustaining the demurrer to the petition, and that its judgment should be affirmed.

LEAVITT V. LAFORCE *et al.*, Appellants.

Fraud: EVIDENCE OF, BETWEEN INTIMATES. Transactions between persons occupying intimate and confidential relations are subject to a more jealous scrutiny than those occurring between mere strangers, and the parties are held to fuller and stricter proof of the consideration and fairness of such transactions, when they conflict with the rights of others.

Appeal from Schuyler Circuit Court.—HON. ANDREW ELLISON,
Judge.

AFFIRMED.

Hughes & Raley for appellant.

SHERWOOD, C. J.—The only question in this case is whether the defendants, Fellows and Winans, are *bona fide* purchasers or incumbrancers without notice. As to Fellows, according to his own testimony, it distinctly appears that there existed between LaForce and himself relations of a friendly and confidential character; that he had the utmost confidence in LaForce; was frequently in his office; made that his headquarters; kept his papers in LaForce's vault, and, when the mortgage was executed, left it there.

In a recent work on fraudulent conveyances the doctrine is announced that transactions between relatives or those occupying intimate and confidential relations, are subjected to a more jealous scrutiny than when occurring between mere strangers, and that in such instances the parties are held to fuller and stricter proof of the consideration and of the fairness of the transaction. The reason given for this rule, in substance is, that fraud is generally accompanied by a secret trust, and hence the selection of one in whom a secret confidence may be reposed, and as sentiments of affection commonly generate such confidence, relatives are usually selected as the repositories of the secret trust; but the same principle applies to all occupying confidential relations toward the party charged with the fraud. Any association, therefore, which generates confidence and its consequent intimacies, "though not a badge of fraud, strengthens the presumption that may arise from other circumstances and serves to elucidate, explain or give color to the transaction." Bump, *Fraud. Convey.*, 54 *et seq.* A doctrine even broader than this has been announced, for it has been held that where the grantor was

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father of the grantee, this relationship was a ground, taken in connection with other circumstances, from which the jury might infer that the son had notice of the trust to which the land was subject in the hands of the father, Coulter, J., remarking: "In regard to such transactions it is impossible to shut our eyes to the relation of the parties. John J. could have inquired any day from his father how he held the land, and the most natural thing in the world is to believe that he did." *Trefts v. King*, 18 Pa. St. 157; *Wade on Notice*, § 25.

It is thus established at the very threshold of this case, that if LaForce had in contemplation the perpetration of that with which the petition charges him, none would with greater likelihood have been selected as an assistant than his familiar, Fellows. Under such circumstances, if we are to be guided by the rule stated in the authority first cited, it would require somewhat more of exculpatory evidence in this, than in other cases where no such confidential relations existed. And if we follow the evident reason of the authority cited from Pennsylvania, the relations of confidence existing between LaForce and Fellows may well justify the belief—may well be regarded as evidence, when considered in connection with other circumstances, that the latter was cognizant of the trust to which the land was subject in the hands of the former. And the importance of the intimacy so existing between LaForce and Fellows becomes especially apparent when it is considered what opportunities were thus afforded the latter for becoming thoroughly conversant with the subject matter of the present litigation.

He knew when taking the mortgage on lands in Schuyler county, that LaForce had exchanged lands also in that county with Leavitt for a stock of goods in Minneapolis, and loaned LaForce some money to go to that point to take an invoice of the goods. Now if the intimacy spoken of really existed, it is extremely improbable, and probability is the chief corner stone of all reliable testimony, that La-

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Force should have told his friend Fellows of the exchange he had made with Leavitt of lands in Schuyler county, for a stock of goods in Minneapolis, requested and received pecuniary assistance for his journey thither and still never told him, even in general terms, what lands he had exchanged. And besides, what inquiry could be more natural, when LaForce subsequently came for the loan of the \$2,000, and tendered a mortgage as security on lands in Schuyler county, than that Fellows should ask him the location of the lands on which the incumbrance was offered. If these and similar inquiries were not made by Fellows, it indicates, on his part, an obvious disregard of the plainest dictates of prudence.

In the case of *Ware v. Lord Egmont*, 4 De Gex, M. & G. 460, Lord Cranworth observed: "When a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held bound by all the consequences of that which he knows to exist. But, where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say not only that he might have acquired, but, also, that he ought to have acquired, the notice with which it is sought to affect him; that he would have acquired it but for his gross negligence of the conduct of the business in question." In short, gross negligence, under certain circumstances, is held, in equity, equivalent to notice.

We are inclined, therefore, to think that the facts we have detailed as to friendly and intimate relations give ground for the conviction that Fellows, owing to such relations, must have become conversant with facts which precluded him from becoming an innocent purchaser, or else that such ample opportunities were afforded him for obtaining the requisite information that his failure to do so can only be regarded as so grossly culpable as to amount in the estimation of a court of equity to that degree of willful negligence which is imputable to the party thus negligent as tantamount to notice.

In regard to the claim of Winans, we attach no importance to the information imparted to him at the time he brought the deed of trust for record; for, at that time, whatever rights existed had already been acquired by the loan of the money. 1 Sto. Eq. Jur. 400.

Winans resided in Mt. Pleasant, Iowa, and it appears from his testimony, came down on the 24th or 25th of March, 1875, to Schuyler county, Mo., and saw one corner of the farm remotely, from the junction depot, about one and a quarter miles off; that he looked at the land with a view of taking a deed of trust to see if it was worth the money. It does not appear that Winans had any other business to call him down to the locality of the land, except to ascertain its value; and, if he did not have, it is altogether beyond the range of probability that he should, having come down for the purpose of looking at the land, have gone no nearer to it than the distance he indicates. Why come from another state to ascertain the value of land offered as security, and never go upon the land to ascertain its value, the nature of the soil and the improvements? The story is quite too improbable for belief. It is contrary to the "experience of common life."

If Winans had ventured to examine the land upon which he contemplated taking an incumbrance, which he did take on the 26th of March, immediately upon his return home, he would have had an opportunity to ascertain from Morton, who was in possession as Leavitt's tenant, the true state of the title, and under whom held. But Winans seems to have studiously avoided going to the farm, as well as Glenwood, where the change of ownership of the farm was well known; at any rate, he did not go there, nor does he in his testimony give any explanation of his very unusual conduct in this respect. It was his duty, when offering himself as a witness, to have left nothing unexplained which would induce unfavorable inferences in regard to his *bona fides*. This he did not do. And it is not to be forgotten that, at Ottumwa, Iowa, where LaForce

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and Fellows resided, the title bond to Leavitt was executed March 5th, 1875, and acknowledged before Morse, LaForce's partner; that, on the 19th of the same month, before the same officer, and at the same place, the mortgage was made to Fellows and acknowledged; that, on the 26th of the same month, and at the same place, and before the same officer, the deed of trust to Winans was executed and acknowledged. These dates and other circumstances we have mentioned do not amount to much when separately considered, but when you consider them all together—when brought together and considered in the aggregate—they leave but little room to doubt the correctness of the judgment, which we now affirm. All concur.

NAPTON V. LEATON *et al.*, Appellants.

1. **Will: EVIDENCE.** To deprive one of land devised to him, on the ground that the testator, after making the will, conveyed the land to another person by a deed which was lost without ever being recorded, the evidence in support of the deed ought to be clear. The sworn statement of the person claiming as grantee, unsupported by other evidence, is not sufficient.
2. **Foreign Judgment may be Impeached for want of Notice.** The record of a judgment rendered in another State may be impeached in a collateral proceeding by evidence showing that the defendant had no notice of the action and never authorized any one to appear for him, even though the record affirmatively states the contrary.
3. **Former Judgment: NO ESTOPPEL.** In a proceeding brought in Tennessee for the settlement of an estate in which the present plaintiff had an interest, to which proceeding she was not made a party, it was adjudged that certain land now claimed by her belonged to another, who, however, was required to account for its value, whereby the distributive share of the present plaintiff was increased and she received a portion of her share in money on that basis. *Held*, that these facts did not preclude the plaintiff from asserting her claim in this action.
4. **No Laches.** Until two years before this suit was brought plaintiff

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had no knowledge of any title in herself to the land sued for. For many years previous her aunt had represented herself to be owner, and had exercised acts of ownership without objection from plaintiff, who during the whole time had labored under the disability either of infancy or coverture; *Held*, that her acquiescence did not amount to laches, so as to bar the assertion of her claim.

5. **Plaintiff in Ejectment, not Required to Refund Taxes.** The plaintiff in ejectment cannot be compelled, before recovering, to refund to the defendant taxes paid by him under a claim of ownership but without title or color or title.

Appeal from Saline Circuit Court.—HON. WM. T. WOOD,
Judge.

AFFIRMED.

Chas. A. Winslow for appellants.

Samuel Boyd for respondent.

NORTON, J.—This is a proceeding in ejectment to recover the possession of the following lands in Saline county, to-wit: The northwest quarter of the southeast quarter of section 17, township 49, range 20, and the southwest quarter of the southeast quarter of section 17, township 49, range 20. The suit was instituted against defendant, Leaton, and Eva W. Miller, being the landlord of said Leaton, and the real party in interest, was subsequently, on her motion, made a party defendant. The petition is in the usual form, and the answer of defendant Leaton is a specific denial of the allegations therein.

The separate answer of defendant Eva W. Miller, after denying specifically the allegations of the petition, avers that the tract of land in controversy was formerly owned by Thomas L. Williams, late of Knox county, Tennessee; that said Williams died in 1856, having previously made a will, dated November 20th, 1854, which was admitted to probate in Knox county, Tennessee, January, 1857; that the thirteenth clause thereof contains this devise: "The land I own in the State of Missouri, which adjoins

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the land conveyed to my daughter, R. L. Shelby, I give and devise to Mary P. Shelby, my granddaughter, she accounting for the fair cash value of said land at the time of my death;" that, after the execution of said will, the testator made a deed to said Mary P. Shelby, now intermarried with William B. Napton, Jr., conveying to her certain lands adjoining lands heretofore conveyed to her mother, which was dated in October, 1856, and in which the tract in suit is not mentioned; that said testator, some time prior to his death, made a conveyance of the land in suit to Margaret M. Miller, his daughter, together with other lands, which deed was lost before being recorded; that, after the will was probated, John Williams, the administrator *de bonis non*, filed a bill in chancery, before the chancellor of the eastern division of Tennessee, sitting at Knoxville, and having jurisdiction, the purpose of said bill being to obtain a construction of said will, and settle the advancements between the legatees, and adjust the kind and character of the advancements; that all the devisees, including Mary P. Napton, then Shelby, were made parties to said bill; that said Mary P. Napton, then Shelby, was a minor, and was represented by David H. Deadrick, as guardian *ad litem*, and in part by William B. Napton, her regular guardian in Missouri; that it was alleged in said bill that the testator, a short time before his death, while on a visit to his daughter, made a deed to Margaret M. Miller, conveying to her the land mentioned in the foregoing devise, and it was asked that she be charged with said land at its value at the time of its conveyance; that Mary P. Shelby, by her answer, insisted that the tracts of land which were devised to her by said will having been conveyed to Margaret M. Miller, in the life-time of the testator, therefore, that the respondent, Mary P. Shelby, was entitled to an amount in money equal to the value of said lands at the time of the testator's death; that, on the hearing before the chancellor and master, Margaret M. Miller was charged with the tract of land in suit at \$8 per acre,

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and the plaintiff was charged with no land, but was allowed her portion in money; that plaintiff, since her majority, and her husband, since the marriage, with full notice and knowledge, received and receipted for her portion on the basis of having the land charged to Margaret M. Miller; that Margaret M. paid the taxes on said land until she conveyed the same to Lewis W. Miller, her son, and the husband of this defendant; that Lewis W. Miller gave a deed of trust on the land to one Sandidge, for the benefit of one Patterson; that Sandidge sold the land, and defendant became the purchaser, and is now the legal owner; that, since the year 1859, M. M. Miller, Lewis W. Miller and this defendant have paid the taxes on the land, aggregating \$110.84; and that they have made valuable and lasting improvements, aggregating \$800, with the knowledge and acquiescence of plaintiffs. These facts are insisted on as an estoppel, in addition to the alleged conveyance of the legal title.

The reply to this answer admits that the land belonged to Thomas L. Williams, who died in 1856, leaving a will, which was probated, the 13th clause being as copied, as alleged in the answer. It is alleged that the land in suit is part of the land described in the bequest aforesaid, and that plaintiff Mary P. Napton, then Shelby, is the granddaughter referred to. It is denied that testator conveyed this land to Margaret M. Miller at any time, or made any deed therefor. It is alleged that Margaret M. Miller falsely represented to the devisees, and to the administrator *de bonis non*, (whether by mistake or not they do not know,) that a deed had been made and delivered to her for said land; that plaintiffs have since been informed that the said administrator, acting upon the supposition that said representation was true, filed the bill in chancery as stated, and alleged therein that said land had been so conveyed, and asked that Margaret M. Miller be charged with the value thereof; that plaintiffs do not know whether she was so charged, but say that no evidence was produced in said

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suit to prove such conveyance; that plaintiffs may have been made parties, but they deny any legal or actual notice, or that any one had any authority to appear for them; and that said Mary P. Napton was a minor thirteen years of age at the time, and was and ever since has been a resident of the State of Missouri. It is denied that she was represented by William B. Napton, Sr., or that Deadrick filed any such answer as alleged, and if he did, it was without authority. It is alleged that no final decree has been made in said chancery suit, and that all the issues involved here are yet pending therein. It is denied that plaintiffs had any knowledge of the orders and decrees of said court, or have acquiesced in the same, or received and receipted for the portion of Mary P. Napton as stated, but that a larger amount is still due her than the value of said lands. It is alleged that said chancery proceeding, so far as it affects this land, is false and fraudulent; that said estate is unsettled, leaving a large amount yet due Mary P. Napton, out of which she is willing to account for the value of said land under the will; and that Lewis W. Miller may have mortgaged the land to Sandidge, but if plaintiff purchased as stated, it was with notice of the fact that the land belonged to Mary P. Napton. The payment of taxes is denied; the making of some improvements is admitted; but the alleged value, and that Mary P. Napton had any knowledge thereof are denied.

Plaintiffs obtained judgment in the circuit court, from which defendants prosecute an appeal to this court.

Both plaintiffs and defendant Eva W. Miller claim the land in controversy, through Thomas L. Williams as the common source of title. Plaintiffs derive their title by virtue of a will executed by said Williams on the 20th day of November, 1854, and admitted to probate in Knox county, Tennessee, in January, 1857, which contains the following clause, viz.: "The land I own in the State of Missouri, which adjoins the land conveyed to my daughter, R. S. Shelby, I give and devise to Mary P. Shelby, my grand-

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daughter, she accounting for the fair cash value of said land at the time of my death." The evidence abundantly shows that the said devise to Mary P. Shelby, now the plaintiff Napton, embraces the land in controversy. Defendant insists that, notwithstanding the provision of said will, the title never passed to Plaintiff Mary P. Napton, formerly Shelby; first, because the testator, subsequently to the date of the will, and previous to his death in 1856, executed and delivered to his daughter, Margaret M. Miller, a certain deed conveying to her the identical lands therein devised to Mary P. Shelby, and that the title to the lands so conveyed, by various *mesne* conveyances, has become vested in defendant Eva W. Miller; second, because the plaintiffs are estopped from disputing the validity of defendant's title to the land in controversy by reason of the proceeding instituted by the administrator *de bonis non* of the estate of said Williams, in the chancery court sitting at Knoxville, in the State of Tennessee.

The questions, therefore, presented for our consideration are two: First, Did Thomas L. Williams, after the date of his will and before his death, execute and deliver to Mrs. Margaret M. Miller a deed conveying the land in dispute? Second, If he did not, are plaintiffs estopped by the said chancery proceeding from asserting title under the will? The trial court determined both these questions in the negative, and we are asked to review its finding in these particulars. This being an action of ejectment, we might dispose of the questions presented by saying that as there was evidence on the trial tending to establish the respective theories of plaintiffs and defendant, we would not consider it for the purpose of determining whether it preponderated in favor of or against either plaintiffs or defendant, that being properly the province of the jury, or the court sitting as a jury, and which we have repeatedly held this court would not invade. But as the parties by stipulation have agreed that a suit in chancery, instituted in the Saline county circuit court by defendant Eva W. Miller

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against the plaintiffs and others, involving the same questions, shall be submitted and determined with the ejectment proceeding, we are justified in looking at the evidence with a view of ascertaining whether these questions were decided by the trial court according to the weight of the evidence.

It may be observed that to deprive a devisee of land under a will on the ground that the testator had subsequently to the date of his will conveyed the same land to another person by deed which is alleged to be lost, the evidence adduced in support of such deed should clearly and certainly establish the fact that it was executed and delivered and conveyed the land devised. In all such cases it would seem to require more evidence than the sworn statement of the grantee claiming under such deed, that it was executed, delivered and conveyed the land. If the evidence of the grantee unsupported by other evidence should be esteemed sufficient to establish such fact, the title to land vested by virtue of a devise in a will would be held by a most uncertain tenure. It is, we think, clear that the evidence offered by defendant to establish the fact of the execution and delivery of the deed does not meet the requirement of the rule above indicated.

Mrs. Miller, the grantee, swears that Thomas L. Williams, her father, who resided in the state of Tennessee, during his visit to Missouri in 1856, made the deed in question at her home in Boonville, Cooper county, Missouri, after the death of her husband, and delivered it to her with at least one other deed and perhaps others, urging and requiring her to place the same on record; that at the time of making the deed Mary P. Napton, then Shelby, a child twelve years of age, being at her house, was called upon by Mr. Williams, her grand-father, to sign the deed or something pertaining thereto; that she never read them, did not know their contents—supposed her father read them to her or told her of their contents—knew he told her that they were for the lands in controversy; that soon after the

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delivery of the deeds she went to Mississippi on a visit to her sister, and after arriving there remembered that she had forgotten to have the deeds registered, and wrote to Mr. Stephens, the administrator of her husband's estate, directing him where to find them, and requesting him to have them recorded; that she had never seen the deed since, and did not know where it was.

The only other evidence bearing upon the question of the execution of a deed to Mrs. Miller, by her father, is to be found in the evidence of McCallister, and which is claimed to corroborate that of the Mrs. Miller. McCallister testifies that he took Williams' acknowledgment to a deed made in May, 1856, at Judge Napton's house in Saline county; that this occurred before the death of Mrs. Miller's husband, that he did not recollect of taking but one acknowledgment of Williams; that Williams told him the deed was to Mrs. Miller, (may have said to his daughter,) for the land across Blackwater, near the land of witness; that he might be mistaken as to the deed to Mrs. Miller, but his recollection was that Williams told him it was to her; that this occurred before the death of Mrs. Miller's husband.

The evidence of this witness, so far from corroborating that of Mrs. Miller, is in conflict with it. McCallister swears that the deed was executed in Saline county, before the death of Mrs. Miller's husband. Mrs. Miller swears that the deed was made after her husband's death, at her house in Cooper county. The statement of these two witnesses are irreconcilable except on the theory that both of them were mistaken in regard to the character of the deeds referred to by them in their respective statements, and that they were so mistaken, we think, is clearly shown by the evidence introduced by plaintiffs showing that on the 8th day of December, 1856, four deeds were filed for record in the recorder's office in Saline county and recorded by the recorder, viz: One from Thomas L. Williams to Mrs. M. M. Miller, acknowledged before Stephens, a notary

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public in Cooper county, October 22nd, 1856, conveying land in Saline county, but not any of that in controversy. One from Thomas L. Williams to Mary P. Shelby, also acknowledged before said Stephens October 22nd, 1856. One from Smith's heirs to Thomas L. Williams. One from Thomas L. Williams to Mrs. Cynthia Berkley, acknowledged before McCallister in Saline county July 25th, 1856, and conveying to her (she being the daughter of said Williams,) land in Saline county. This evidence, while it establishes that Mrs. Miller was not mistaken as to her father having made her a deed at her house in Cooper county, also establishes the fact that she was mistaken as to the land conveyed by it; and while it establishes the fact that McCallister was not mistaken as to having taken the acknowledgment of Williams to a deed conveying lands across Blackwater in Saline county, it also very strongly tends to show, if it does not conclusively show, that he was mistaken in respect to the time when it was taken and the person who was the grantee in the deed. We are, therefore, of opinion that the evidence fails to establish the execution of the deed conveying the land in question to Mrs. Margaret Miller, and that the trial court did not err in so holding.

Nor do we think that the proceeding instituted by the administrator *de bonis non* of the estate of said Williams in the chancery court of Knox county, Tennessee, as alleged in the answer, so far as it affects the title to the land in dispute, is binding or conclusive upon the plaintiff, or that she is estopped thereby from asserting title to the land devised to her by said will. The record and evidence clearly show that the plaintiff, Mrs. Napton, when said proceeding was instituted, was in her minority, being only about fifteen years of age; that she had no notice of said proceeding, never appeared to the same, nor authorized any one to appear for her; that the statement in the bill filed, that the testator, Wil-

2. FOREIGN JUDGE-
MENT MAY BE IM-
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WANT OF NOTICE.

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liams, after making his will, had conveyed, by deed, the lands in question to Mrs. Miller, was made upon the representations of Mrs. Miller to the administrator that such was the fact; that, while the record in said suit shows that Mr. Deadrick filed an answer as guardian *ad litem* of Mary P. Shelby, it also shows that he did so without authority, not having been appointed by the court for that purpose; that no proof was taken in regard to the truth of the allegation in the bill, that Williams, the testator, had in fact conveyed the land as therein alleged; that Miss Shelby had never been in Tennessee since she was five years old, and that, in 1862, while still a minor, she intermarried with William B. Napton, Jr., and has ever since remained under coverture; that a judgment or decree rendered under the circumstances above detailed cannot have the effect of depriving her of title to the land sued for, or that she cannot be estopped thereby, we think is clear. A judgment rendered without notice is void (*Anderson v. Brown*, 9 Mo. 640; *Roach v. Burnes*, 33 Mo. 319), and advantage may be taken of such judgment in a collateral proceeding. *Abbott v. Sheppard*, 44 Mo. 273; *Higgins v. Peltzer*, 49 Mo. 152. Want of service of notice, or that appearance by attorney was unauthorized, may be shown to impeach a foreign, as well as a domestic, judgment; *Marx v. Fore*, 51 Mo. 69; and this can be done, even though the jurisdiction of the court over the person appeared affirmatively from the record. *Eager v. Stover*, 59 Mo. 87.

It is also insisted that, as the chancery court in Tennessee, in making distribution of the estate of said Williams charged Mrs. Miller with the value of the land in question, whereby Mrs. Napton's distributive share in said estate was increased, it would be inequitable to allow her to recover the lands and retain the proceeds of her distributive share thus enlarged. This argument could be more appropriately addressed to the chancery court in Tennessee, which is invested with jurisdiction

3. FORMER JUDGE-
MENT: NO ESTOP-
PEL.

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to make distribution of decedent's estate according to the terms of the will and the laws of the State of Tennessee, especially so, as it appears that no final judgment has been rendered by it, but that said proceeding is still pending. It is for the chancery court in Tennessee, and not this court, to correct the mistake made in charging Mrs. Miller with the value of the land, the title to which, under the will, was vested in Mrs. Napton.

It is also insisted that plaintiffs are estopped by their conduct and laches from asserting title against Mrs. Margaret Miller, or her representatives. While
4. NO LACHES. it may be conceded that courts of equity neither encourage laches nor foster the prosecution of stale demands, and will, in a proper case, deny relief on such grounds to the party seeking it, the facts and circumstances developed by the evidence in this case do not call for the application or enforcement of the principle. It appears from the evidence that, at the time of the death of the testator, Williams, Mrs. Napton was a child twelve years of age, residing in Missouri, and she testifies that all "she knew about the land in suit was that her aunt, Mrs. Miller, claimed to own it, and heard her and others say that she had mortgaged it in 1866; that she first saw a copy of her grandfather's will about two years before this suit was brought; that she never saw the land, and knew nothing about improvements upon it." Mrs. Napton being the niece of Mrs. Miller, nothing is more natural than that she would place implicit confidence in the truth of her statement that she owned the land in controversy, and it is not at all strange that she acted upon the belief that the fact was as her aunt represented it to her.

To say that non-action on the part of Mrs. Napton in the assertion of her right to the land in suit, which was occasioned by the conduct and representations of Mrs. Miller, through whom defendant claims, should be imputed to her as laches and work an estoppel, would be a total

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perversion of that equitable doctrine, especially so when it is considered that during the time she was laboring either under the disability of minority or coverture, and was neither apprised of her rights under the will nor of the fact that Mrs. Miller was mistaken in regard to the representation made by her, that she was the owner of the land, till about two years before this suit was instituted. It certainly does not lie in the mouth of those who claim under Mrs. Miller to claim that the conduct and laches of plaintiff, induced and brought about solely on account of her misrepresentations, should operate as an estoppel. Simple acquiescence by plaintiff in the truth of the representations made by Mrs. Miller, she being in ignorance of her title, cannot work an estoppel. *Smith v. Hutchinson*, 61 Mo. 83.

It is also insisted that plaintiffs ought not to be allowed to recover the land without accounting for taxes paid and improvements put thereon.

So far as the question of compensation for improvements is concerned, the statute regulating ejectment suits provides an ample method for its adjustment; and, before the recovery is made effectual by the execution of a writ of possession, defendant can institute the proceeding therein provided, alleging in her petition the statutory requirements necessary to entitle her to compensation for improvements. Besides this, compensation for improvements might well be denied in this suit, as it appears that they were made by Stredger & Leaton, lessees of defendant, in consideration of the use of the land.

As to defendant's right to recover taxes paid, it may be said that such payments were not made upon request of plaintiffs, but were entirely voluntary; that the assertion of title on the part of Mrs. Miller, upon the truth of which plaintiff relied, had the effect of depriving her of the use and enjoyment of the lands, and of allowing the use of the same to remain with defendant. No action can be maintained for money

5. PLAINTIFF IN
EJECTMENT, NOT
REQUIRED TO RE-
FUND TAXES.

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paid for another, except upon previous request, express or implied, or subsequent assent and sanction. *Allen v. Richmond College*, 41 Mo. 302; *Clafin v. McDonough*, 33 Mo. 412. Judgment affirmed, in which all concur, except NAPTON, J., who did not sit in the case.

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